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THE TRADING WITH THE ENEMY ACT AND THE DEFINITION OF AN ENEMY

IN any discussion of the Trading with the Enemy Act of 1939[1] it would be pointless to enumerate the confused mass of statutes and proclamations of the period of the last war which it replaces. But it is fitting to notice a certain improvement in legislative technique which has been achieved in the new Act. As the (statute) law on the subject stood before, it was the duty of the subject to refrain from such conduct as was declared by proclamation to constitute the (statutory) offence of trading with the enemy. Now he is enabled to dispense with the not inconsiderable research formerly involved in finding out the precise scope of his duties. For there is to be found in section 1 of the Act of 1939 a general description of what, for the purposes of that enactment, is deemed to be trading with the enemy, namely: "any commercial, financial or other intercourse with, or for the benefit of, an enemy or a person acting on behalf of an enemy."[2] The truth of the oft-repeated doctrine that war is not merely the affair of nations but of every one of their subjects and inhabitants as well is thus roundly enunciated and no longer left to be gathered from an interminable list of prohibited acts by an *argumentum e contrario*. It is to be concluded, therefore, that the ground covered by the common law as to trading with the enemy

[1] 2 & 3 Geo. VI; ch. 89.

[2] Para. 2 of the Defence (Trading with the Enemy) Regulations, 1940 (S. R. & O., No. 1092) constitutes, by way of amendment of s. 1 of the Act, any attempt at such intercourse an offence also.

is now covered also by statute, except in so far as the common law and statutory definitions of an enemy may differ.

And indeed they do appear to differ to some extent. It is intended in this study to examine and assess the importance of the divergences apparent. In some cases these will be seen to be slight and of trivial significance. In others they will appear serious and far-reaching in effect. In all the differences will be best brought out by a scrutiny, stage by stage, of the various categories of enemies mentioned in the Act and their immediate consequences most satisfactorily demonstrated by means of a short concluding summary. Discussion of *minutiæ* is useless before the stipulations of the Act are stated and their import appreciated. The method employed, therefore, will be to compare with the classes of enemies known to the common law those mentioned in the Act. These last are (though not in that order): (1) Enemy States and Sovereigns; (2) Enemy Corporations; (3) Individuals resident in enemy territory; (4) Persons whose names are on the Statutory List. The conclusions to be drawn from this comparison will then be summarized.

But it is possible, before going into details, to realise some of the remoter implications and questions of principle involved in the divergence of the common law and statutory definitions. Those of the Act are laid down "for the purposes of this Act" and cannot, therefore, apply *proprio vigore* in matters other than trading with the enemy. But those known to the courts of common law as well as to the Court of Admiralty had a common root and therefore applied indifferently in all manner of causes. Whether the question was one of an individual's *persona standi in judicio*, of the fate of his contracts, of the liability of his goods to seizure as prize of war, or of whether his character was such that it was a misdemeanour to trade with him, the tests were the same. This uniformity is well illustrated by the singular and unquestioning alacrity with which the Prize tribunals and the ordinary courts relied upon each others' decisions. Argument from one class of case to another was frequent; for instance, when Lord Alvanley, C.J., said in *McConnell* v. *Hector*: "I do not wish to hear it argued that a person who lives and carries on trade under the protection and for the benefit of a hostile state, and who is so far a merchant settled in that state that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled to sue as an English subject in an English court of justice."[3] Similarly, more than a century later Lord Reading, C.J., could say: "Trading with a British subject or the subject of a neutral state carrying on

[3] (1802), 3 Bos. & Pul. 113, 114.

business in the hostile territory is as much assistance to the alien enemy [? enemy State] as if it were with a subject of enemy nationality carrying on business in the enemy State, and, therefore, for the purpose of the enforcement of civil rights, they are equally treated as alien enemies."[4] The Prize Courts, too, were not behindhand in adopting and applying common law decisions. Thus in *The Hoop*, a case of trading with the enemy, Lord Stowell relied on *Gist* v. *Mason*,[5] a decision of Lord Ellenborough, C.J., saying: "the rule in no degree arises from the transaction being upon the water, but from principles of public policy and public law, which are just as weighty on the one element as on the other, and of which the cases have happened more frequently upon the water, merely in consequence of the insular situation of this country."[6] Likewise, when the "control" test of the enemy character of corporations was enunciated in the *Daimler* case,[7] which had to do with trading with the enemy, it was immediately applied in relation to prize in spite of the expressed doubts of its author as to its universality.[8]

This happy uniformity was little impaired by the activities of the legislature during the last war. The Aliens Restriction Act, 1914,[9] did, it is true, introduce a "personal"—as distinct from "territorial"—test to determine the liability of a person to internment; but this was a well-defined exception. So also was the "Black-list" introduced by the Trading with the Enemy (Extension of Powers) Act, 1915[10]; this last was possibly not at all inconsistent with the doctrines of the common law.[11] But in the main no attempt was made to modify the ancient definitions. Even within the sphere of the offence of trading with the enemy the statutes, and the proclamations issued thereunder, were not exhaustive.[12] They tended rather to enact special penalties for common law offences.[13] The result was that the rules governing enemy character preserved a valuable simplicity. Those who were enemies were enemies for all purposes, and those who were friends, friends always. The abandonment of a single rule, and the creation of a special class of persons for the purposes of the new Act is,

[4] *Porter* v. *Freudenberg*, [1915] 1 K.B. 853, 868.
[5] 1 T.R. 89.
[6] 1 C. Rob. 196, 216.
[7] [1916] 2 A.C. 307.
[8] *Vide infra*, p. 168.
[9] 4 & 5 Geo. V, c. 12; cf. s. 5 (1) of the Treachery Act, 1940, 3 & 4 Geo. VI, c. 21.
[10] 5, 4, 6, Geo. V, c. 98.
[11] *Vide infra*, p. 179 ff.
[12] Cf., however the Trading with the Enemy (Amendment) Act, 1914, 5 Geo. V, c. 12, and *Central India Mining Co. Ltd.* v. *Société Coloniale Anversoise*, [1920] 1 K.B. 753.
[13] Cf. *Robson* v. *Premier Oil & Pipeline Co. Ltd.* 31 T.L.R. 420.

therefore, when judged by the criteria of convenience and elegance, to be regretted.

This, however, is not the only unfortunate consequence of the divergence of the definitions of the Act from those of the common law. For there will inevitably be a tendency, born of the very uniformity of the pre-existing law, for the new definitions to escape their express bounds and invade other spheres. The question whether the Act affects the category of persons whose contracts are avoided by reason of their being enemies is bound to arise almost at once. Further, since, to quote Lord Stowell again, "in consequence of the insular situation of this country" most cases even of the criminal offence of trading with the enemy arise upon the seas and thus come before the Admiralty Division, the question of the force of the statutory definitions in that Court will require to be resolved. Finally, there is the consideration that the Prize Court, which if not unduly partial to the Crown's interests, is at least not unmindful of them, has a certain facility in finding ways of adopting new rules not strictly applicable, as the history of the rule in the *Daimler* case shows. In regard to all these matters there is a danger that those important words of s. 2 "for the purposes of this Act," will be ignored. The result would be the gradual adoption of a new uniform rule—that of the Act. That result is not intended, nor is it indeed desirable; but the forces working towards it are too great to be ignored. It would involve, in those cases where the provisions of the Act are narrower than the customary rules, a diminution in the effectiveness of the law and, in those cases where they are wider, the possibility of serious abuse of belligerent rights. Happily, it can be avoided if the limitations of the Act, and the peculiar features of its definitions, are clearly understood.

I. Enemy Character of States and Sovereigns

S. 2 (1) of the Act of 1939 lays down that, for the purposes of the Act, the expression "enemy" used in its provisions shall include "(*a*) any State, or Sovereign of a State, at war with His Majesty." As regards States at war with the King, no doubt the common law rule was the same; the doctrine of conditional contraband clearly assumes this. But the express mention of the sovereigns of such States brings to mind pretty problems which might arise if it were not there. Could it be that, even under the Act, such a sovereign is not an enemy *qua* an "individual resident in enemy territory"? And what is his character if he leaves the territory of the enemy State—either to preserve his liberty without abandoning the struggle or to visit another State of

which he is also sovereign but which is not at war? The problem involved is not unconnected with that dilemma which confronts a neutral Government when the Head of a State at war demands asylum while his armies fight on; shall they intern him as a combatant or accord him the privileges due to a prince who is—to them—friendly? This latter difficulty may have been resolved by the precedent which Rumania's treatment of the President of the Polish Republic created. And the fate of the Sheik of Bahrein's gift of coffee—consigned to Herr Hitler personally—may indicate that the English courts long ago decided to regard kings themselves as players in the game of kings. The point is a small one, but of some antiquarian interest. In connection with it, it is to be recalled that, while the public property of enemy States within the realm was commonly confiscated, there appeared formerly to be a rule "of law"[14] that the private property of hostile sovereigns was inviolate.[15]

II. Enemy Character of Corporations

The Act deals with two distinct classes of enemy corporations. Firstly it provides that "any body of persons constituted or incorporated in, or under the laws of, a State at war with His Majesty" shall be treated as enemy.[16] This class of corporations was also regarded as possessing enemy character at common law. The rule is possibly a harsh one,[17] but its revision would involve such difficulties for the Courts that it is scarcely to be desired. And it is possibly unsound from the point of view of theory since incorporation determines the nationality rather than the domicile of artificial persons, and it is domicile rather than nationality which is said to be the ruling principle in the determination of enemy character. The converse of the rule—that all corporations of British or neutral register are friendly—has been found, of course, to be incapable of application, and it is for this reason that the Act specifies a second category of enemy corporations. But before passing to these it is necessary to make two observations upon the way in which the Act deals with enemy-registered corporations. In the first place it is to be noticed that its

[14] Cf. Oppenheim, *International Law* (5th edn.), Vol. II, pp. 270–1.

[15] Admittedly this was held also to be the rule with all other enemy private property. But the two cases are not quite parallel since the exemption from confiscation of goods already within the realm belonging to enemy subjects was attributable, historically, not so much to a conviction that all private property was an improper object of attack as to the doctrine that enemy subjects *here* resident were not "enemies." See the passage from Vattel cited by Marshall, C.J., in *Brown* v. *U.S.*, 8 Cranch 110, 124. Cf. the case of *In re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. 107, and the literature thereon, referred to in Oppenheim, *op. cit.*, Vol. II, p. 271, n. 1.

[16] S. 2 (1) (*d*).

[17] For a particularly hard case see *The Noordam* (*No.* 2), [1919] P. 255.

provisions are possibly not, in this connection, as wide as those of the common law. For the Act speaks only of incorporation "in, or under the laws of, a State at war with His Majesty" and not of incorporation in enemy territory (which would include territory occupied by an enemy State).[18] Thus a corporation registered in occupied territory would not be, *per se*, hostile. There was formerly some doubt as to the position at common law.[19] But the narrower rule of the Act is certainly to be preferred.

In the second place it is necessary to examine the effect of the proviso to s. 2 (1) upon enemy-registered corporations. That proviso is to the effect that the statutory definition of an enemy "does not include any person by reason only that he is an enemy subject." The latter term is defined by s. 15 (1) as including "(*b*) a body of persons constituted or incorporated in, or under the laws of, a State at war with his Majesty"! It is to be noticed also that such corporations are likewise specified both as enemies and as enemy subjects in s. 8 of the Import, Export and Customs Powers (Defence) Act, 1939.[20] The reason for this provision is not immediately obvious. It may have been the intention of the legislature to mitigate the old rule and to apply a more exact test of domicile to corporations by requiring something more than mere incorporation in enemy territory to invest them with hostile character. If this was the intention, it has not been realised. To enact that a mere enemy subject is not to be treated as an enemy and to lay down a definition of enemy subjects which includes enemy-registered corporations will not divest such corporations of the enemy character which is already fastened on them by reason of s. 2 (1) (*d*); the provision, as it stands, is an absurdity.[21]

The second category of enemy corporation created by the Act embraces "any body of persons (whether corporate or unincorporate) carrying on business in any place, if and so long as the body is controlled by a person who under this section is an enemy." In these words the Act has adopted, more or less, the common law rule first laid down in *Daimler Co. Ltd.* v. *Continental Tyre and Rubber Co. (Great Britain) Ltd.*,[22] that is to say, the so-called "control" test of enemy character. But it has not adopted it quite exactly. For Lord Parker of Waddington, who first

[18] Cf. s. 15 (1).

[19] Cf. *The Bathori*, [1933] p. 22; *Central India Mining Co. Ltd.* v. *Société Coloniale Anversoise*, [1920] 1 K.B. 753, and especially *S.A. Belge des Mines D'Aljustrel* v. *Anglo-Belgian Agency Ltd.*, [1915] 2 Ch. 407, 414–5.

[20] 2 & 3 Geo. VI, c. 69.

[21] Since the foregoing passage was written the proviso to s. 2 (1) has been amended by para. 3 of the Defence (Trading with the Enemy) Regulations, 1940 (S. R. & O. No. 1092), the word "individual" being substituted for "person" therein.

[22] [1916] 2 A.C. 307.

formulated it, applied that test only to "a company incorporated in the United Kingdom."[23] Yet his remarks with reference to the plaintiff corporation in *Netherlands South Africa Railway* v. *Fisher*[24]—"as it happens a company of neutral incorporation, which is an *a fortiori* case,"[25] and the fact that, in *The Hamborn*[26] the Privy Council applied the *Daimler* test to a foreign (Dutch) company, indicate that the previous rule was as wide as that of the Act, in so far as the latter relates to bodies corporate.

But whether or not its application to "any body of persons (whether corporate or *unincorporate*)" marks an extension is a question less easy to solve. Its solution demands some little examination of the *Daimler* rule. This rule, to which legislative sanction is now given, involved a "piercing of the corporate veil" quite inconsistent with the English theory of corporate personality, but considered essential for the effective prosecution of the war. Its history has been a curious one. It was adopted with enthusiasm both by the courts of common law and by the Prize tribunals, the consideration that its first enunciation by Lord Parker, though concurred in by Lords Mersey and Kinnear and approved by Lords Sumner and Atkinson, was quite *obiter* being entirely disregarded. And in the process of adoption it appears to have lost its pretended theoretical justification. For Lord Parker based his departure from the classic doctrine of *Salomon's Case*[27] upon the distinction between the character in which a corporation holds property and that in which it enjoys its capacity to act. These he held not to be *in pari materia*. "In questions of property and capacity, of acts done and rights acquired or liabilities assumed thereby," it was his opinion that "when the law is concerned with the artificial person, it is to know nothing of the natural persons who constitute and control it."[28] The character in which property is held, which is a mere part of the energies and acquisitions of a corporation, is derived from the circumstances of its incorporation, which arise once and for all. But "the character in which the capacity to act is enjoyed and acts are done" is "a quality of the company itself, and conditions its capabilities and its acts."[29] This character is not static, being settled finally at the time of incorporation, but arises from "qualities of enmity or amity, which are dependent on the chances

[23] *Ibid.*, at p. 344.
[24] 18 T.L.R. 116.
[25] [1916] 2 A.C. 307, 339.
[26] [1919] A.C. 993. The point of the propriety of the extension of the test was not, however, argued.
[27] [1897] A.C. 22.
[28] [1916] 2 A.C. 307, 344–5.
[29] *Ibid., loc. cit.*

of peace and war" and is determined by reference to the predominant character of the individual corporators who are in control. Eminent writers have taken these words to mean that the *Daimler* test applies only where a question of trading with the enemy is involved, and thus not to cases where the issue is simply one of the liability of the goods of a *prima facie* friendly corporation to seizure in prize as enemy property.[30] Such a conclusion is logical enough; yet it is startling. For it is apprehended that, so far as the "territorial test" of enemy character is concerned, English law knows but one rule. There are not in this connection, unless the legislature has created them[31]—and Lord Parker was of course dealing with the common law—different classes of enemies for different purposes. Thus it was not surprising that the Privy Council in *The Hamborn*[32] and the Prize Court in *The St. Tudno*[33] cases where the issue was not one of trading with the enemy but of liability to condemnation in prize—"question of property," that is—ignored the limitation. The result of this was, of course, to deprive the rule of its expressed foundation, the distinction between the character in which a corporation holds property and that in which it acts. Reflection would lead to the conclusion that this distinction is baseless: the continued holding of property is as much an act as any other. Moreover, as ancient authority shows,[34] it is an act struck at by the law relating to trading with the enemy as much as any other.

In view of this impairment of its theoretical basis it may be seriously doubted whether the *Daimler* rule, in its elaborated form, is good law. Its final adoption in the Act of 1939 is thus possibly a matter for regret. But it is criticism from another point of view which compels examination of the propriety of its extension to unincorporate bodies. The rule, in the form in which it was known before the Act, constituted a "tampering with the central theory of corporation law." It did not, of course, involve a complete overthrow of that theory, being "restricted in its application to the time of war . . . and . . . not meant to affect the normal rules which accord to corporations a personality and rights of ownership entirely distinct from those of its shareholders."[35] In the opinion of Sir William Holdsworth it emerged because of the absence of any power in the Crown to proceed

[30] Cf. e.g. McNair in IV *British Yearbook of International Law* (1923), 44, 55.
[31] *Vide supra*, p. 163.
[32] [1919] A.C. 993.
[33] 86 L.J., P. 1.
[34] *McConnell* v. *Hector*, 3 Bos. & Pul., 113; *Esposito* v. *Bowden*, 7 El. & Bl., 763. But Lord Parker, it should be said, distinguished these cases.
[35] Decision of U.S.-Allied Arbitration Commission in the *Standard Oil Company Tankers Case*, *Annual Digest*, 1925-1926, Case No. 353, at p. 464.

against a limited company for trading with the enemy as it might have done against a common law corporation.[36] The facts of the *Daimler* case are too well-known to need any repetition, but a new light is thrown upon them when it is realised that, in theory, the party primarily engaged in trading with the enemy was not the Daimler Company but the Continental Tyre and Rubber Company, which had commerce with its—legally distinct—enemy corporators. In the light of this analysis it can be seen that the "control test" was fundamentally unsound. Undoubtedly some way must, for the sake of national safety, be found to deal with corporations of friendly register which are in fact enemies. But where the offending corporation is within the jurisdiction there can be no warrant for ignoring the character impressed upon it by its registration. And where it is not so within the jurisdiction then, if the question is one of trading with the enemy, the Statutory List is an adequate weapon of defence, or, if the question is one of the liability of its goods to confiscation as enemy property, the solution is not to be found in attacking the whole basis of English corporation law but either in applying those rules as to "adherence to the enemy" which are known to the Prize Court, or in examining what degree of recognition that Court accords to the personality of foreign corporations.

Still less is there any justification for extending, as the Act purports to do, the "control test" to unincorporate bodies. It is evident from the foregoing sketch of the history of the *Daimler* rule that it was a device—and a clumsy and inconsistent device—for surmounting the difficulty that, in theory, a corporation, "can be neither loyal nor disloyal. It can be neither friend nor enemy."[37] It was designed to strike at bodies corporate whose trading with the enemy consisted in dealings—inevitable in the nature of things—with corporators who happened to be enemies. Because the law could not effectively apply penal sanctions to a corporation trading with the enemy in this way, it took to brushing aside the veil of artificial personality in order to see who the shareholders were. But, it is important to notice, having found these to be enemies, the law dropped the veil again, declaring the corporation to be itself an enemy. In view of the fact that the dealings of a corporation and its members *inter se* consist largely in continuing acts of ownership and management, this process, however regrettable in theory, is not particularly unjust. The main result achieved is a species of immobilisation of enemy property. This being so, it is impossible to criticise the adoption

[36] *History of English Law*, Vol. IX, pp. 71, 103–4.
[37] Per Buckley, L.J., in the *Daimler* case, [1915] 1 K.B. 893, 916.

of the same test by the Prize Court, which is also concerned with putting enemy property, as it were, out of circulation. But the moment it is applied to unincorporate associations it becomes necessary to examine what are the relations of these bodies with the enemies who control them and to ask what is the result of the application of the test to them. For here there is no "corporate veil" to be lifted and dropped again. The association struck at has no distinct existence and is but a convenient collective name for the persons composing it. It cannot, therefore, trade with the enemy only by having enemies among its members; it is none other than its members and a man cannot, it is apprehended, trade with himself. Thus if the intention of the Act is to strike at unincorporate bodies having *the same sort of relations* with the enemy as do corporations with their (enemy) corporators its provisions are tautological. For it can only reach associations of persons who "under this section [are] enem[ies]" already! Some other species of relations with the enemy must, therefore, be in contemplation. What relation other than ownership and management can be held to be comprised in the term "control"? Lord Parker did not refer to any, and the Trading with the Enemy (Amendment) Act, 1918,[38] which expressly defines an "enemy-controlled corporation," admits of none.

It may perhaps be said that this is a narrow view and that the obvious intention of the legislature is to provide for the case of neutral associations in some way acting under the instructions of the enemy. Why, then, it must be asked, were neutral individuals not dealt with similarly? And it must be remarked that this is a somewhat dangerous construction. Once, it is conceded, that enemy "control" may consist in something less than management or predominant interest, the way is opened for an attack on almost any neutral firm which has any sort of commerce with the enemy. An offence of "trading with associations which trade with the enemy" is created. In relation to corporations, this is of course what the decision in the *Daimler* case most illogically did. But that rule was dictated by special considerations applying only to corporations and contemplated only a special sort of relation between the corporation and the enemy, namely, the proprietorship of the latter in the former. Doubtless it is competent to the sovereign power to prohibit its subjects from intercourse with persons who trade with the enemy in any way; but it is unlikely that that was the intention of Parliament when enacting this particular provision. And it is certainly not competent to the sovereign power to make such persons enemies for

[38] 8 & 9 Geo. V., ch. 31; s. 13.

purposes of prize also. It would be a gross abuse of belligerent rights if their goods were to be seized and condemned as enemy property. Thus, if the wording of the Act represents anything more than an imperfect formulation of the common law rule, it will have the unfortunate result of impairing that unanimity in the definition of an enemy which has been characteristic of British courts. If a strained construction is put upon the Act by the courts of common law in connection with trading with the enemy, there will always be a tendency for the Prize Courts to follow suit, as the history of the *Daimler* rule shows. Any yielding to this tendency would, in the present instance, be most prejudicial to the reputation of the Prize tribunals.

In this connection it must finally be remarked that the wording of the Act, considered as a mere statement of the *Daimler* rule without amplification, is open to criticism. For a corporation incorporated under the laws of a neutral State which is wholly under the control of *bona fide* neutrals but which carries on business in enemy territory is an enemy at common law because, to use the words of Lord Parker, "its agents or the persons in *de facto* control of its affairs, whether authorised or not, are resident in an enemy country. . . ."[39] But the particular formulation of the "control test" contained in the Act would appear to preclude its operation in this case. The common law, through the mouth of Lord Parker, says that a corporation is an enemy if it has *agents* resident in enemy territory. But the Act holds it hostile only if it is *itself* "controlled" by enemies. No doubt the effect of this difference is in practice small, but it is as regrettable as is the application by the Act of the "control test" to unincorporate bodies. In this case, however, the scope of the old rule, which will still apply in Prize, is not narrower but wider.[40]

III. Enemy Character of Individuals

The original text of the Act of 1939 mentions but one class of enemy individuals, namely, those who are "resident in enemy territory." And it is expressly provided that no one is to be deemed to be an enemy "by reason only that he is an enemy subject." Clearly, therefore, the rule of the Act is narrower than

[39] [1916] 2 A.C. 307, 345.

[40] This defect has to some extent been remedied by the amendment of s. 2 in accordance with para. 3 (*a*) of the Defence (Trading with the Enemy) Regulations, 1940, S.R. & O. No. 1092. The effect of the amendment, as to which *vide infra*, would appear to be to make the corporation of the example also an enemy, but only as respects its business in enemy territory. Lord Parker did not discuss the case of a corporation having agents in enemy territory but also carrying on business elsewhere. But the common law rule would presumably be the same. *Vide infra*, p. 173.

that of the common law, the most popular expression of which is to be found in the following passage of the judgment of the Court of Appeal in *Porter* v. *Freudenberg*: "For the purpose of determining civil rights a British subject or the subject of a neutral State, who is voluntarily resident or who is carrying on business in hostile territory, is to be regarded and treated as an alien enemy and is in the same position as a subject of hostile nationality resident in hostile territory."[41] In so far as relates to persons "carrying on business" the Act has, however, been amended; now "as respects any business carried on in enemy territory, any individual or body of persons (whether corporate or unincorporate) carrying on that business" is also to be deemed an enemy.[42] How far this amendment reproduces the common law rule is a question which must be examined later. Meanwhile it is to be noticed that the passage cited above is not exhaustive as to who are enemy individuals at common law, nor even accurate as far as it goes. Thus even a faithful and complete reproduction of its substance must inevitably have produced a different rule.

The traditional doctrine of all nations was that every subject of an enemy State was an enemy. In England, "with the growth of commerce and greater tenderness to private property"[43] this came to be modified in two ways. The consideration that private property as such was not a proper object of attack in public wars occasioned the development of the rule that an enemy subject resident in British territory or trading there with the licence of the Crown was not to be treated as an enemy. The exceptional nature of this benevolence to individuals is apparent from the stress laid on the necessity for a royal licence. So, even as late as 1915, the Courts, in holding that the "odious plea" would not avail against a resident enemy subject, were constrained to imply such a licence from the fact that the plaintiff had been permitted to remain in the country.[44] Secondly, the increase in the importance of trade as a source of the sinews of war caused British and neutral nationals resident in enemy territory to come to be regarded as enemies.[45] This was the position at the time when the case of *Porter* v. *Freudenberg* arose. But it did not justify such generalisation as that "The test of a person being an alien enemy is not his nationality but the place in which he resides or carries

[41] [1915] 1 K.B. 857, 869.

[42] Para. 3 (*a*) of the Defence (Trading with the Enemy) Regulations, 1940, S.R. & O. No. 1092.

[43] Per Scrutton, L.J., in *Tingley* v. *Müller*, [1917] 2 Ch. 144, 172.

[44] *Princess Thurn und Taxis* v. *Moffit*, [1915[1 Ch. 58. For examples of earlier cases see *Alciator* v. *Smith*, 3 Camp. 245; *Alcinous* v. *Nigreu*, 4 El. & Bl., 217.

[45] *The Harmony*, 2 C. Rob. 322. *Cf.* Bynkers hoek *Quaestiones Juris publici*, i. 3, fin. . . .

on business."[46] For the ancient test of allegiance, i.e. nationality, had not been abandoned. While in the case of a British or neutral subject resident in enemy territory, "something more than mere verbal declaration, some solid fact, showing that the party is in the act of withdrawing, has always been held necessary"[47] to prevent his being treated as an enemy, the mere fact that war has overtaken him in a hostile land will possibly not be conclusive as to his character. Conversely, enemy character will still tend to cling to individuals of hostile allegiance though they are not actually resident in enemy territory. It is not enough that they should not be so resident, nor that they are resident elsewhere.

The truth is more nearly approached when it is said that the test of enemy character is "commercial domicile": every British or neutral subject who has or retains a commercial domicile in enemy territory is an enemy; and every enemy subject who has or retains a friendly commercial domicile is a friend. By that phrase is not meant civil domicile, which consists in such permanent residence in a country as makes that country a person's home, and which is gained by taking up residence with the intention of remaining. Commercial domicile—the term is equally applicable to persons not engaged in trade[48]—consists rather in "such a residence in a country for the purposes of trade or otherwise as makes a person's estate form part of its resources."[49] It may thus be acquired by residence with no intention of leaving shortly, and yet is not constituted by the mere fact of residence or presence. Thus, in *The Rostock*,[50] though a German subject had carried on business in Ceylon for five years and had actually resided there in a hired house for three years, the Prize Court of Egypt refused to consider him as having a friendly commercial domicile because he had once returned to Germany for four months. Whether the English courts would take the same view and would treat an enemy subject in England as an enemy unless he had a commercial domicile here is uncertain, but there are indications to that effect in *Tingley* v. *Müller*.[51] Equally, the rules relating to the loss of commercial domicile differ from those applying to civil domicile. The latter can only be lost by abandonment *animo et facto*, but the former is divested more easily. That this should be so when the enemy subject visits his own country is reasonable because "the native character easily reverts,

[46] *Porter* v. *Freudenberg*, [1915] 1 K.B. 857 (headnote).
[47] Per Lord Stowell in *The President*, 5 C. Rob. 277, 280.
[48] Dicey, *Conflict of Laws* (2nd edn.), p. 741.
[49] Dicey, *op. cit.* (3rd edn.), p. 812.
[50] 1 B. & C. P.C. 523.
[51] [1917] 2 Ch. 144, 179.

and . . . it requires fewer circumstances to constitute domicile in the case of a native subject than to impress the national character on one who is originally of another country."[52] But it is a little unjust where he merely goes to another neutral country, because of the peculiar rules as to the effect of loss of commercial domicile. When a civil domicile of choice is lost and a new one is not acquired, that which reverts is the domicile of origin, which is not necessarily the nationality of the *de cujus*. Only when no domicile of origin can be discovered will his nationality, as such, be looked to. In the case of a commercial domicile, however, the character which reverts is that which is given by allegiance. Thus in *The Flamenco, The Orduna*,[53] where a German subject had abandoned a neutral commercial domicile in order to go, not to Germany, but to another neutral country, he was held to be an enemy. This divergence is due in part to the survival of the ancient and natural thesis that nationality is decisive of enmity and in part to the fact that the onus of proof of friendly character is on the person alleging it. In prize, if the captor can show the claimant to be an enemy "by birth or by domicile," it is for the latter to prove that, in the one case, although he is an enemy subject he has a friendly domicile,[54] or in the other, that he has some special claim to indulgence.[55] Similarly at common law, when the plea of alien enmity is raised, it is for the plaintiff to prove that he is not an enemy.[56] And the same is the case in criminal proceedings in respect of the offence of trading with the enemy, for "Otherwise a British subject is justified in trading with a German, wherever found, unless it can be proved that the German is resident or carrying on business in Germany, a position which, in view of the very various and dubious purposes for which a German may at present be found outside, seems a very dangerous one."[57]

No considerations as to the incidence of the onus of proof will, however, operate so as to make the rule of the Act as wide as that of the common law. To enact that it is an offence to have commerce with individuals resident in enemy territory cannot put upon the subject the obligation of proving that he is dealing with no person who is there resident, still less that the persons with whom he is in fact dealing are not merely not so resident but even domiciled elsewhere. The only rule as to proof introduced into the statute—to the effect that in any proceedings thereunder the

[52] Per Lord Stowell in *La Virginie*, 5 C. Rob. 98, 99.
[53] 1 B. & C.P.C. 509.
[54] *The Antares*, 1 B. & C.P.C. 261.
[55] *The Bernon*, 1 C. Rob. 86, 102.
[56] *Harman* v. *Kingston*, 3 Camp. 150.
[57] Per Scrutton, L.J., in *Tingley* v. *Müller*, [1917] 2 Ch. 144, 175.

fact of dispatch of a document addressed to a person in enemy territory shall create a rebuttable presumption that the addressee is an enemy—tends to increase rather than to diminish the divergence between the Act and the pre-existing rules relating to the enemy character of individuals.[58] For in this instance there is a wide and serious divergence; its theoretical implications have been discussed already, and its immediate and practical consequences are sufficiently clear from the words of Scrutton, L.J., in *Tingley* v. *Müller* cited above.

Had the text of s.2 not suffered an alteration through the introduction of a second category of enemy individuals—persons carrying on business in enemy territory—the gap would have been even wider. This belated provision does not, of course, bring the Act into line with the common law in the matter of commercial domicile—loosely styled "residence" in *Porter* v. *Freudenberg*. It has now to be seen whether it does so in relation to the carrying on of business in enemy territory without residence there. In view of the qualification in the Act that this activity affects the persons responsible with enemy character only "as respects" any business so carried on, there might appear to be a gap here also. For no such limitation was mentioned in *Porter* v. *Freudenberg*. But in this instance the draughtsman appears to have avoided an inaccuracy in the definition laid down in that case and to have reproduced the customary rule exactly. In *The Manningtry*[59] Sir S. Evans, P., adverted to the same qualification in these words: "Apart from a commercial domicile by residence, the property of a person may acquite a hostile character, independently of his national character or his personal residence. If a person be a partner in a house of trade in an enemy's country, he is, *as to the concerns and trade of that house*, deemed an enemy." The same view is expressed with equal clarity in the judgment of the Privy Council in *The Anglo-Mexican*.[60] Such authority is too respectable to be gainsaid, and it must be admitted that, in regard to individuals carrying on business in enemy territory while residing elsewhere, the Act has made no innovation.[61]

Yet it is not without interest to notice that before the last war the restriction of the effects of enemy character in this case was not at all clearly established. The two cases mentioned had to do with the question whether the property of persons of friendly

[58] S. 1 (3A) of the Act; this was added to the original in virtue of para. 2, sub-para. (3) of the Defence (Trading with the Enemy) Regulations, 1940.
[59] [1916] P. 329, 339–40.
[60] [1918] A.C. 422, 425.
[61] As is the position at common law of corporations similarly engaged *vide supra*, p. 171.

nationality trading in enemy territory is to be treated as good prize immediately upon the outbreak of war, or whether such persons are to be allowed a period of grace in which to dissociate themselves from the enemy. In each a distinction was drawn between persons with an enemy commercial domicile, who are not allowed that privilege, and persons with a mere enemy house of trade (i.e. who are carrying on business in enemy territory without residence), who are. The authority relied on in regard to the treatment of the former category was the decision of the majority of the United States Supreme Court in *The Venus*.[62] Unfortunately for the validity of that authority, however, the Supreme Court appears in that case to have regarded a subject of one belligerent *domiciled* in the country of the other as an enemy only "with reference to the seizure of so much of his property concerned in the trade of the enemy, as is connected with his residence"; this view is, of course, quite untenable.[63] Moreover, this statement, and declarations to the same effect in *The Manningtry* and *The Anglo-Mexican* are mere *obiter dicta*. For no property of the claimants unconnected with an enemy house of trade was in any of these cases before the court, so that the question of its fate was academic.[64] The only decision which really supports the rule is that of Lord Stowell in *The Portland*.[65] There vessels belonging to the same owner but having nothing to do with his enemy house had also been captured and were released because that great judge denied that he knew of any case or "of any principle, that could support such a position as this, that a man, having a house of trade in the enemy's country, as well as in a neutral country, should be considered in his whole concerns as an enemy's merchant, as well in those which respected solely his neutral house, as in those which belonged to his belligerent domicile."[66] Even here the proposition is somewhat impaired by the fact that, it being considered that the claimant had effectually bidden an *aeternum vale* to his enemy partners, the rest of his property was also released. The issue is in all cases much confused by the imprecision of the terms commercial domicile and house of trade. The former term, which appears to have been first used by Marshall, C.J., in his dissenting judgment in *The Venus*,[67] was never employed by Lord Stowell, though he was obviously familiar with the concept it connotes. On the contrary he tended to apply

[62] 8 Cranch 253, 280.
[63] *The Manningtry*, [1916] P. 329, 339. *Cf. McConnell* v. *Hector*, 3 Bos. & Pul. 113; *The Anglo-Mexican*, [1918] A.C. 422.
[64] *Cf.* also *The Ann* 1 Dods. 221.
[65] 3 C. Rob. 41.
[66] *Ibid.*, at pp. 44–5.
[67] 8 Cranch. 253, 297.

the word domicile to a house of trade, as in the passage cited from his judgment in *The Portland*, in which case the claimant was clearly "domiciliated" in neutral territory.[68] The use of the expression "constructive residence" as synonymous with house of trade by Washington, J., in *The Venus* did not help towards clarification. One thing, however, emerges clearly. The doctrine that an enemy house of trade affects its neutral domiciled owner with enemy character only as regards the concerns of that house, if it exist at all, is known only to the Prize Court. Its explanation is probably to be found in the use which that court makes of the rules relating to the enemy character of individuals. Jurisdiction in prize is essentially *in rem* and a court of prize pays attention to individuals only in virtue of the rule that the character of goods and vessels is determined by the character of the owners. But the latter rule is not without exceptions. It does not, for instance, apply to goods captured *in transitu*, the property in which is to pass to enemies only on delivery; there is here a corollary that "capture constitutes delivery." Nor does it apply to neutral-owned produce of enemy soil.[69] The rule that the goods of an enemy house of trade are condemnable, whosoever the owners, is but one more exception to the general *prima facie* test of domicile, comparable to the others mentioned, and also to the now defunct Rule of the War of 1756. All are equally dependent on that "doctrine supported by strong principles of equity and propriety that there is a traffic which stamps a national character on the individual, independent of that character which mere personal residence may give him."[70] These principles of equity and propriety are, however, satisfied when the goods connected with the forbidden traffic are condemned. A Court of Prize is, by reason of the real nature of its jurisdiction, not interested in the individuals engaged in that traffic nor concerned in fastening upon them a general enemy character. Though where a person has interests in both an enemy and a neutral house of trade and the transactions between the two are mixed up, the Court will not undertake to unravel the tangle; that is the duty of claimants and, if they fail in it, they must suffer the consequences.[71]

Other jurisdictions, on the contrary, are concerned with enemy individuals as such. Thus courts having to deal with the

[68] *Cf.* also *The Hypatia*, [1917] P. 36, 40.

[69] In *The Phoenix*, 5 C. Rob. 20, 21, Lord Stowell said, "the possession of the soil does impress upon the owners the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be."

[70] Per Lord Stowell in *The Vigilantia*, 1 C. Rob. 1, 15. *Cf.*, Wheaton, *Elements of International Law* (8th edn., Classics of International Law Series), pp. 352–3.

[71] *The Posteiro*, 3 B. & C.P.C. 275, 288.

offence of trading with the enemy must know who are enemies. There appears to be no evidence as to whether the Court of Admiralty, which had most to do with the question because of the geographical position of England, held it to be an offence to have any intercourse whatsoever with the possessor of an enemy house of trade. It is, therefore, uncertain whether the Act of 1939 has altered the law by adopting the limitation, observed by the Prize Court for reasons of mere lack of concern, of the effects of the character fastened on him to the business of the enemy house. In *Porter* v. *Freudenberg* and in the *Daimler* case, where words were used which gave no hint of the acceptance of any such limitation in regard, respectively, to the definition of an enemy for purposes of the right to sue and the avoidance of contracts, the point was not argued as it did not directly arise even with respect to these matters.[72]

IV. The Statutory List

In s. 2 (2) of the Act of 1939 provision is made for the issue of the Statutory List. This device is, of course, no innovation for it was first used in 1915. But the authority to place names upon it which, under the Trading with the Enemy (Extension of Powers) Act of the latter year,[73] was exercised by means of a Royal Proclamation or by Order in Council made on the recommendation of a Secretary of State, is now vested in the Board of Trade. In terms that authority is now wider than it was during the period of the last war. For, whereas in virtue of s. 1 (1) of the Act of 1915, persons or bodies, not being persons or bodies residing or carrying on business solely within British territory, might be "black-listed" on grounds of enemy nationality or association, it is now theoretically competent to the Board of Trade to list the name of any person in any place, for any reason. It would be no departure from the letter of the law to list the names of all the residents, however loyal, of Belgrave Square and thus make it a criminal offence for anyone to supply them with the means of sustenance. Yet there can be no doubt that this power is meant to be exercised upon the same principles as were expressly prescribed in the Act of 1915, and its apparent lack of limits can be accounted for on two grounds. Firstly, experience of the Great War showed that it was often inexpedient to reveal the principles on which the list was drawn up, or even the fact of the inclusion of a particular name in it. Thus in administrative practice to-day a distinction is drawn between the "Statutory List," which is

[72] *Supra*, pp. 175 and 171.
[73] 5 & 6 Geo. V. c. 98.

published, and the "black-list," which is kept secret from the persons upon it. The former has many gaps, and its latest consolidated issue does not contain the name of a single person or firm in the United States.[74] Secondly, the fact that there are now portions of British territory which are not subject to the Parliament of Westminster and which need not co-operate in measures against an enemy makes it desirable that there should be a means of preventing intercourse with inhabitants of such autonomous territories who are adhering to the enemy. Apart from the looser formulation which these considerations dictate, the new provisions respecting the Statutory List do not differ from those of the Act of 1915.

But to rest content with this statement would be to beg the whole question of the relation of the Act to the customary law. It is necessary to go further and to inquire how far persons named in the List are otherwise enemies. Are they, for instance, enemies for purposes of prize? Assuming the principles upon which a name was included under the Act of 1915 still to apply, there is good ground for considering this to be possible. The List cannot be regarded as applying *proprio vigore* in relation to anything but the statutory offence of trading with the enemy, because it is expressed to be relevant solely for the purposes of the Act. But it is to be remembered that the persons named in it, *ex hypothesi* under the Act of 1915 and in all probability still, are persons of "enemy nationality or enemy association." And in connection with the first category of these it is also to be recalled that, while domicile is the *prima facie* test of enemy character, the grand principle is still allegiance. The British Courts will not, indeed, treat a person as an enemy by reason only that he is an enemy subject. There would, however, be nothing improper in their so doing from the point of view of the law of nations; Prize tribunals of other countries, notably those of France, have adhered rigidly to the test of nationality. As has already been seen, even the British Courts will apply it in default of proof of friendly commercial domicile. If, therefore, enemy subjects are included in it not merely on grounds of nationality but because of suspicion that their trade or estate has not become wholly part of the resources of the country of residence and is in fact still at the service of the enemy, there seems no reason why the Prize Court, and the common law courts for the matter of that, should not treat the List as creating, as regards such persons, a *prima facie* presumption of general enemy character, capable of rebuttal. For, even within the sphere in which it has binding force, the List

[74] 1940, S.R. & O. No. 1499.

has the appearance of being a reminder to merchants as to who are enemies rather than of creating a new class of enemies.

Its use in the manner suggested in relation to non-enemy subjects would seem, at first sight, to be more objectionable. An individual of friendly nationality cannot, it is true, possess a hostile commercial domicile without residence, at one time or another, in hostile territory. If he merely has an enemy house of trade he is an enemy only as respects his interest therein. Trading to and from the enemy's country is permitted even to a British subject domiciled in neutral territory.[75] But possession of an enemy commercial domicile is not the only circumstance which is capable of affecting a friendly subject with general enemy character. This appears clearly from the decisions relating to that particular circumstance. The theory was that the acquisition of such a domicile amounted to temporary naturalisation in the country of residence; often it involved naturalisation in fact, as the importance attached in earlier cases to "Burgerbriefs" shows.[76] This process of reasoning is well brought out in the judgment of Sir James Marriott in *The Postilion* (1779). The report says: "The ground of the decision was that a national of Hamburgh, resident in France, would have his property condemned by the law of nations as an adopted Frenchman *pro hac vice*; and so the King's declaration of reprisals expresses it, that the ships and goods of persons inhabiting the territories of the French king shall be subject to reprisals; and therefore the same equity operates the other way, that a Frenchman, resident at Hamburgh, shall be considered as a Hamburgher, and have the advantages of protection. . . ."[77] And there were cases of a different sort where the same presumption of assimilation to the position of a foreign subject arose without there being any element of residence or domicile in the foreign country. For instance, in *The Embden*, Lord Stowell said of a Prussian national: "he is a single man who has established no domicil by family connections; and in his own person he has been employed constantly for ten years in trading from Amsterdam to Greenland; by such an *occupation* he is divested of his national character, and becomes, by adoption, *a perfect Dutchman*."[78] The rule was that wherever there was an "hostile adherence and a commercial adherence,"[79] whether consisting in commercial domicile or something else, the

[75] Opinion of A-G. Northey, *temp.* Queen Anne, cited in Chalmers, *Opinions*, Vol. II, p. 363; *The Danous*, 4 C. Rob. 255 n.
[76] *Cf. The Ann*, 1 Dods. 221.
[77] Hay & M. 245.
[78] 1 C. Rob. 16, 17.
[79] *McConnell* v. *Hector*, 3 Bos. & Pul. 113, 114.

person responsible was treated as an enemy for all purposes. But where the line between adherence to the enemy and a mere enemy house of trade was drawn is not certain. Such acts as engaging in a trade not open to foreigners in time of peace or accepting an enemy safe-conduct apparently affected merely the adventure. But full participation in the enemy's coastwise trade[80] or sailing under his colours[81] seems to have invested the neutral individual with full enemy character. But it is perhaps impossible to go further than to say that the general principle is that, whereas neutrals may trade in all manner of goods with either belligerent, subject only to the risk of confiscation of the adventure, if they "mix in the war" they do so at the risk of losing altogether their neutral status.[82] To the extent that the expression "enemy association" used in the Act of 1915 is synonymous with the term "adherence to the enemy," persons whose names are included in the Statutory List on grounds of their enemy association are enemies also at common law and for purposes of prize. But if the term "enemy association" is any wider than this difficulties are likely to arise from any reliance on the List by the Prize Court. It would be contrary to international law to treat, for instance, a neutral subject as being in all respects an enemy merely because he traded with the enemy. That consideration need not, however, deter the Courts from treating mention in the List as a circumstance to be taken into account in determining the character of an individual. For there is no question that, in a proper case, a neutral national may be treated as an enemy. And in this connection it is to be noted that there is considerable authority for the view that the application of the *Daimler* test to companies incorporated under the laws of neutral States is "no abuse of a belligerent right."[83]

V. Summary

The following propositions are offered by way of a summary of the divergences between the definitions of the various classes of enemies which are laid down in the Act of 1939 and those which were developed in the courts of common law and of prize—

(1) While in general the Act and the common law agree in designating as enemies both States at war with the Crown and the sovereigns of such States, there was formerly some doubt as to the

[80] *Dispatch of Lord Howick*, dated 1807, cited in Mahan, *Some Neglected Aspects of War*, p. 191.
[81] *The Rebecca*, 11 Acton 119; *The Hart*, 3 Wall. 559.
[82] Cf. decision of Chase, C.J. in *The Bermuda*, 70 U.S. 200, 205.
[83] *Cf.* Hyde, *International Law*, Vol. II, s. 796.

position of the latter in regard to the liability of their property in England to confiscation.

(2) Whereas the Act makes enemies corporations registered in or under the laws of a State at war with the Crown, the rule of the common law was possibly wider, extending also to corporations registered in enemy-occupied territory.

(3) Though the Act has adopted in principle the rule in the *Daimler* case it has formulated it differently. Thus, while at common law a corporation is an enemy if it has agents resident in enemy territory, under the Act it is affected generally with enemy character only if it is itself controlled by persons there resident. Further, though with what effect it is doubtful, the Act extends the same rule for the first time to unincorporate bodies.

(4) Whereas at common law the general test of enemy character of individuals was commercial domicile, the Act adopts that of residence, coupling therewith the conception of the enemy house of trade, previously known only in prize law and only as a test of the enemy character of goods. Thus, while at common law an enemy subject not resident in enemy territory was not *per se* a friend, the Act now produces that result. Similarly, while a person carrying on business in enemy territory without being there resident was not previously, so far as can be ascertained, an enemy for purposes other than prize, he is now an enemy for the purposes of the Act, but only as respects his enemy business. Yet, while a body corporate incorporated in friendly territory but having agents in enemy territory has hitherto been treated as being wholly an enemy, under the Act such a body is an enemy only as respects the business of its hostile agency.

(5) Whereas under the Trading with the Enemy (Extension of Powers) Act, 1915, it was incompetent to the authorities to place upon the Statutory List the name of any person or body of persons being a person or body residing or carrying on business solely within British territory, the new Act removes that limitation.

CLIVE PARRY.

THE CONCEPT OF LEGAL CERTAINTY
A PRELIMINARY SKIRMISH

> "SEEING that I cannot choose any subject of great utility or pleasure, because my predecessors have taken as their own all useful and necessary themes, I will do like one who, because of his poverty, is the last to arrive at the fair, and not being otherwise able to provide himself, chooses the things which others have already looked over and not taken, but refused as being of little value. With these despised and rejected wares—the leavings of many buyers—I will load my modest pack, and therewith take my course, distributing not indeed amid the great cities, but among the mean hamlets, and taking such reward as benefits the things I offer."[1]

This is by way of apology for adding a small drop to the flood of writings in which one approaching the problems of the place of law in society, and the judicial function, must now struggle. They are problems of compelling interest and importance to the present generation; but the material at the disposal of the writer grows much less rapidly than that in other more specific branches of the law. The observed phenomena in a legally organised society and in its judicial machinery have, for the purposes of the legal theorist, been virtually constant for some length of time. The progress made in their study has been by method rather than by material, and the multiplication and expansion of such sciences as sociology and psychology has made significant contributions. In America, especially, the inadequacy of the old and essentially English legal forms has compelled courts, and therefore also publicists, to cast about for suitable matter on which to found a new jurisprudence. Many of the acutest thinkers of the times have joined in the quest, and its urgency is obvious. With a separate series of reports for each of forty-eight jurisdictions, and with a nation-wide system of federal courts superimposed, what hope is there for *stare decisis* in the welter of authorities which confronts the unfortunate practitioner?[2]

[1] Leonardo da Vinci, *Notebooks* (New York, 1939), p. 57.

[2] For a proper discussion of this subject see Goodhart, "Case Law in England and America," 15 *Cornell Law Quarterly*, 173, reprinted in *Essays in Jurisprudence and the Common Law*, p. 50. The author emphasises five reasons for the trend away from the English doctrine of precedent: (1) The uncontrollable flood of American decisions; (2) The predominant position of constitutional questions in American law; (3) the American need for flexibility in legal development; (4) the method of teaching in American law schools, and (5) the restatement of the law by the American Law Institute. The first three reasons are the real ones, and the last two their consequences. The civilian system, as exemplified in

Given time, diligence and Shepard's citations, it should be possible to find authority both for and against almost any proposition which could be stated. It is no wonder that lawyers desire to escape a labour that is so vast and from which the results are so precarious.

Nor has the American judge, even if offered citations in a more or less tractable form, the disposition to regard them as they have been regarded in the country where the system was born and developed—a country where the judicial system has been built on the accretions of centuries of social experience, where changes have been slow, and where the absence of geographical difficulties has made possible great administrative solidity and a closely-knit central judicial system. It could only be a miracle if such a system could continue unchanged in a country of such kaleidoscopic aspect as the United States. It is a country where political parties are still sectional, not yet social; where the last decade has seen migrations of the populace which show that, though there is no longer a moving geographical frontier, many economic boundaries are still uncharted; and where huge distances, coupled with nearly every varying degree of climatic conditions, make the most pointed possible contrast with the little, long-settled and homogeneous island where the common law took root. In short, conditions in the United States demand the cultivation of an indigenous jurisprudence, and not the transplantation of some product of another clime.

But the transplantation, in form at least, has taken place; and we must therefore observe the changes by which new shoots can be engrafted on the old stock. It is in the method of observation that some caveat is thought necessary here, for the purpose of this essay is to defend legal concepts in general, and common law traditions in particular, against inferences from special situations which are put forward as if of universal validity. The imperfections of human observation and judgment are such that, for much of our thinking, the laws of causation go by the board. We see the effect first, we search for the reason afterwards—the former, *ex hypothesi*, is certain, the latter is not; and it is too often true that the effect does more to explain the cause than the cause to explain the effect. So it is with these legal changes: they are seen, and they must be rationalised. Let us pay our

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France, is also discussed, and the American trend in this direction is observed. The constitution of the United States has clear affinities with a code of the French type, as it leaves wide scope for judicial "interpretation"; and the case law which has filled in its interstices reflects the French concept of precedents as consisting only in bodies of cases and not in individual decisions.

respects to this valiant activity, but bear in mind which parts of it are fact and which conjecture.

Another note on method: we shall have to face the conflicting attitudes of idealists and realists, and ask (*a*) what is the purpose of law in society? and (*b*) to what extent, in actual practice, can law fulfil that purpose? It is always difficult to know to what extent an unfavourable answer to (*b*) may go without making necessary an alteration of (*a*); and this is the point at which opinions are most likely to diverge. The answer to (*b*) will, it is certain, be in some degree unfavourable; but it is no less certain that this will not necessarily impugn (*a*). Indeed, once (*a*) becomes a datum, it can be asked whether any incompatibility in (*b*) can justify modification.[3] It is pure guesswork where the line should be drawn, if it should be drawn at all; and those who make most of the guesses are in a very special relation to the subject they study. They are mostly lawyers who devote much of their lives to wrestling with the imperfections and conflicts that arise within their legal system, and they are naturally tempted to overemphasise these—as a doctor, in constant contact with illness, might despair of the health of the human race, or a psychiatrist despair of its sanity.

A. The Purpose of Law in Society

What follows here is either so trite as to make further repetition of it tedious, or else so controversial that it is presumptuous to treat it so summarily—and I am not certain which. Law exists to ensure the order which the forces in control of a society desire to impose. Its object is uniformity of action, so that one member of the society may know how, in certain circumstances, another is likely to behave, this being the essence of security. Subsidiary to the concept of order is that of justice; for society needs first stability, and secondly (though this is a marked refinement) the kind of stability that gives a measure of protection to all its members. Justice in law is a quality which cannot be explained except by reference to some further value, and that value is set by whatever general opinions happen to be current in the society of the moment. These opinions, of course, will vary greatly from time to time and from person to person. To say that a rule is "just," like saying that it is "good," involves at once the enquiry as to what is its purpose, and as to whether it fulfils it. It is merely to say that, as a means, it is appropriate to the end

[3] Compare Mr. Justice Holmes' sophistry: "It often is a merit of an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the *ennui* of monotonous perfection." *Collected Legal Papers*, 242–3.

proposed. The idea of justice and the idea of law are both equally the products of social conditions, and though they are generally concomitant they are by no means necessarily so. Many laws are thought to be unjust by greater or smaller sections of the population; many can only be connected with "justice" by an exercise in mental gymnastics, while their purpose of ensuring order and uniformity is sufficiently clear.[4] For a rule of law, *ex hypothesi*, requires that certain people shall act, or forbear to act, in a certain way; and if it did not do so it would not be a law. But no one to-day would suggest that a rule is not law purely because it is considered by most to be unjust.[5] We may not, ostrich-like, deny the existence of what we do not wish to see.

Law then is an ancillary or adjective science, concerned not with the problem of how a man can best live, but with the provision of a secure environment within which he can live as he pleases, provided he allow his neighbour to do the same.[6] There is of course the modern tendency (happily less prominent in democratic countries than in others) to more and more governmental interference in regions which used to be thought the preserves of individual enterprise. But this tendency, though its pace has been accelerated in present-day society, has been operative ever since law has been known, and its presence does nothing

[4] Of this last type are most road and river traffic laws, housing and sanitary laws, local bye-laws, etc. Behind these is the assumption that it is immaterial what people may do so long as they all do the same thing. The widening activities of government departments call for more and more legislation of a purely regulatory character.

[5] Dean Pound (*Law and Morals*, p. 35, n. 68) quotes Duguit as saying "An act contrary to right (*droit*) cannot give rise to a right (*droit*) even by the omnipotence of a law (*loi*)." But read in its context (*Traité de Droit Constitutionnel*, 2nd ed., p. 157) the statement is surely not a general one. Duguit is arguing the special question, in French law, whether a delict or quasi-delict will give a personal right of action to the injured party. He does not seem in any way concerned with morals.

[6] Mr. J. L. Parker, in the 9th edition of Salmond on *Jurisprudence*, p. 72, writes of the theories of Kant and the English utilitarians: "The doctrine may be true and is still widely supported by popular Anglo-American thought; although in its cruder utilitarian form, and in economic spheres it has few theoretical supporters. In any case it requires to be proved, and one of the chief reasons for the revival of interest in Natural Law theories is the increase of doubt whether it is true, or whether perfection and/or happiness are not to be sought rather in some degree of subordination of the individual and absorption of his will and desires in large collectivities, not merely as means to necessary order, but for the better fulfilment of his nature, and if so what rules govern the limits, if any, within which such absorption is desirable, how far one group be the sole or supreme higher-whole in which the individual should merge, and what basis can be found for the claims of such higher-wholes." If the value of utilitarianism must be "proved," this can hardly be done except by historians—and their conclusions are only persuasive evidence for the present or future. The principle of "live and let live" is surely sufficiently dominant in modern thought, and particularly in modern legal thought, to let pass without question. What was said by Bramwell, B., in *Bamford* v. *Turnley* (1862), 3 B. & S. at pp. 82 ff., is still very much alive—see *Hollywood Silver Fox Farm, Ltd.* v. *Emmet*, [1936] 2 K.B. 468.

to alter the fact that law consists of negative rather than positive rules.[7] The lawyer helps to set the stage for the drama of life—he contributes little to the play.

"Justice" is indeed a term susceptible of many meanings, and it is by their confusion in a single word that it has come to be regarded as part of the essence of law. In so far as it means "equality," "impartiality" or "uniformity" it has more in common with the political idea of order than with the moral idea which is also implied in the word. It is this latter which is foreign to law, but which is confused with it because it is so often one of the forces operative on the makers of law that it comes to be thought to be part of its nature.[8] The reconciliation of ethics with justice is supremely necessary, but it does not help to suggest that the two are really one. The purpose of this essay is to defend the concept of legal certainty, and to make clear that the problem which faces lawyers and sociologists is that of making legal certainty and legal justice conform. To abandon the one for the other would merely reproduce all the present difficulties in converse form.

In so far as any generalisation can approximate to the truth, it may be said that it is more important for a rule of law to be certain than for it to be just.[9] If I know that certain acts will involve me in certain legal consequences, I at least know what to do and what to avoid, even though I may feel aggrieved. But I will surely have a much greater grievance if the law is in such a state that, however I act, I put myself in peril of a lawsuit or a prosecution. It would be intolerable for a man to have to rely on his own moral judgment in order to know whether a court would approve his actions or not. He himself might be mistaken (for one of the parties to a controversy almost invariably is), and even if he guesses correctly there are the idiosyncrasies of the judge and jury to be taken into account. Moral justice is a question of individual opinion, and therefore impossible as a

[7] Rights and duties resulting from status rather than from contract (assuming that the State may have rights, and that mere citizenship or nationality can be called a status) are, according to Salmond, without exception negative (*Jurisprudence*, 9th edn., p. 317).

[8] To take Salmond's terminology again, justice is an historical, not a legal source of law.

[9] See Mr. Justice Brandeis, 285 U.S. at p. 406: "*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."

Wurzel (*Das juristishe Denken*, p. 9) seems to think that certainty is at least the essential form of law. He says: "Bis zu einem gewissen Grade muss das Recht allerdings immer die Tatsachen sich unterwerfen, soll es als wirkliches (positives) Recht gelten. . . . Bis zu einem gewissen Grade müssen daher immer die rechtlichen Normen auch als tatsächliche Naturgesetze der gesellschaftlichen Entwicklung in Betracht kommen können, d.i. die Gesetze des Sollens als jene des Seins." See p. 19, note (35) below.

ground for general rules of action.[10] If enough individuals agree, and if they are in control of society, they can establish rules of legal justice, and use their political power to make others conform to what they think is good. They call this justice; and if their society is solid enough there will soon grow up general concepts of justice which will be handed down from generation to generation and become rooted in their policies. This has been so in every modern state, and the most summary contrast of their beliefs and ideals will show how protean a term justice has become.

The ordering of society under law makes it possible for each person to give his energies to more valuable things than the defence of his person and property against his neighbours. Law is a condition precedent to life, and stands in relation to philosophy much as pure liberalism stands in relation to politics. Mr. T. S. Eliot has recently said of liberalism what might well also be said of law: that it is

> "something which tends to release energy rather than accumulate it, to relax rather than to fortify. It is a movement not so much defined by its end as by its starting point; away from, rather than towards something definite."[11]

Then comes something even more pertinent. He says that its attitude and beliefs

> "are destined to disappear, and are already disappearing. They belong to an age of free exploitation which has passed; and our danger now is, that the term may come to signify for us only the disorder the fruits of which we inherit, and not the permanent value of the negative element. Out of liberalism itself come philosophies which deny it."[12]

This is intensely true of the idea of legal certainty at the moment. It has reigned supreme, if not unchallenged, since the birth of jurisprudence as a science. It is out of its very strength and validity that more frequent and more bitter attacks are coming to be made upon it. The more firmly certainty and order are posited as the end of law, the more weight will be given by critics to such uncertainties and disorders as exist in the system. The logic of the old tag that the exceptions prove the rule is certainly difficult. But it enshrouds this truth, that if the rule were not a rule there would be nothing exceptional about the exceptions. Of course, the most reactionary legal fundamentalist would not

[10] Aristotle's famous dictum is to the same point: "To seek to be wiser than the laws is precisely what good laws forbid." (Rhet. I, 15.)

[11] *The Idea of a Christian Society*, pp. 12–13.

[12] *Ibid.*, p. 16.

claim universality for his rules. For rules are by definition generalisations, and it is sometimes, if not always, true, that "general propositions do not decide concrete cases."[13]

As law exists for security, confidence and freedom, it must be invested with as much certainty and uniformity as can be provided by the wavering structures of human institutions. This seems so clear as to need no further repetition, though it needs defence from some of the assaults which have been made on it. One of the most recent, and because of its thorough consideration of earlier work, one of the most complete, is Mr. Jerome Frank's book "Law and the Modern Mind."[14] Mr. Frank finds in psychologists, both professional and amateur, the latest and most fervent recruits to the rebellion against traditional ideas, and he sets out to lead them against the old entrenchments where, he would have it, the powers of darkness, stupidity and self-deception are ranged against the children of light. The Modern Mind emerges from the encounter rather severely mauled, and condemned as such an unreliable instrument as to discourage anyone who might think to use it on the difficulties of modern law. Psychologists are a courageous and pioneering race, and entitled perhaps to rather more tolerance and encouragement than others of the "pseudo-scientists." But there seems among them an almost irresistible temptation to bring their studies to this result: that they can frame an indictment of nearly all the mental processes of the human race, while at the same time postulating the accuracy of their own. This happy position makes possible an attack not merely on the machinery of judicial administration, as dissonant from the purpose of law, but upon the very purpose itself. The desire for certainty can be explained away as a psychosis, an unhealthy state of mind produced by inhibitions, repressions and substitutions. It can be dressed up in this kind of language and, together with its causes and effects, held up to the ridicule which will always fall upon incongruity of clothing. The guise in which law is now presented is that of a father-substitute, to which is attributed that certainty and omniscience which a child, at a certain stage, tends to attribute to his father. Mr. Frank traces the process, through the perfect ante-natal peace and security which surrounds a child *en ventre*

[13] The difficulties of generality are noticed again at pp. 197–198, below.

[14] (New York, 1930)—*pace* Mr. Mortimer J. Adler, who will not concede that the book has any merits. His vitriolic review of it in 31 *Columbia Law Review*, 91 ff., attacks primarily Mr. Frank's handling of his authorities, and his attitude to formal logic. He meets Mr. Frank with his own weapons—ridicule, and an array of imposing names—which for his purpose is good tactics, but probably not the most effective strategy. One *tour de force* is not necessarily more convincing than another. Mr. W. W. Cook's postscript, *ibid.* 108, is a necessary antidote.

sa mère, the world of power and comfort into which he is born, where his every need is satisfied without any effort on his part, to the stage where, finding that he is not himself omnipotent, he then sees in his father "all that is certain, secure, infallible," embodying "exact law-making, law-pronouncing and law-enforcing."[15] The child is still trying to construct for himself the world of safety and certainty from which he came. But the heaven that lay about him in his infancy becomes more and more fictitional, and finally comes the day when even the father is seen not to be the all-powerful protector which his son thought him. So the childish desires have to be projected into some other entity. The child

> "cannot completely accept this disillusionment. He has formed an irresistible need for an omniscient and omnipotent father who shall stand between him and life's uncertainties. The child's own sense of power and control vanished in early infancy. Now life seems to demand that he shall take a next step and abandon his reliance on the conviction that someone close to him possesses consummate wisdom. . . . Surely, he feels, somewhere there must be Someone who can control events, make the dark spots light, make the uncertain clear. Chance and contingency he will not submit to as finalities."[16]

And then:

> "That religion shows the effects of the childish desire to recapture the father-controlled world has often been observed. But the effect on the law of this childish desire has escaped attention. And yet it is obvious enough: To the child the father is the infallible judge, the maker of definite rules of conduct. He knows precisely what is right and what is wrong and, as head of the family, sits in judgment and punishes misdeeds. The Law—a body of rules apparently devised for infallibly determining what is right and what is wrong and for deciding who should be punished for misdeeds—inevitably becomes a partial substitute for the Father-as-Infallible-Judge."[17]

Mr. Frank is very careful to emphasise that this is only a partial explanation, and this is obviously a necessary concession. He is also fully alive to the temptations to over-simplification which beset any scientific thinking. But caveats, however sensible, will not protect what is vulnerable to direct criticism, and Mr. Frank's theory is subject to review in various aspects which are not purely concerned with the hypotheses of psychology.

[15] *Law and the Modern Mind*, p. 15.
[16] *Ibid.*, p. 16.
[17] *Ibid.*, p. 18.

An argument in the form of a demurrer would seem that to which Mr. Frank's position is most open. One is inclined to grant him his premises, and all his deductions from them except the last. It would be gross presumption for the lawyer to challenge on grounds of accuracy the very acute and attractive rationale of the development of an adolescent mind, which the author borrows from a number of distinguished thinkers, and embellishes with observations of his own. It may well be true that the desires of a human being are, in general, more retrospective than anticipatory, that he is always trying to reproduce the conditions of peace and security out of which he was thrust into the world;[18] and, granted this, it is certain that these desires will play a great part in the scheme of life which men set up for themselves, in their environment in general and, as is our particular concern, in law. But it is open to anyone, and most of all to the prisoners at Mr. Frank's bar, the lawyers who have for centuries espoused fallacious theories, to dispute the final conclusion, the final moral and social judgment to which his argument, partial explanation though it be, brings him. The flaw in his reasoning seems to lie in the word *non-adult*, and the derogatory connotation which he gives to it. He explains why the non-adult state of mind is a natural result of the upbringing and environment of the child, but he does not explain why, being so, it is bad. The child is born, and grows, with a desire for certainty and security, and retains it, in some measure, all through life. To attack an instinct of this kind as an unnatural thing suggests that one could also call in question the instincts for food, air, light, and whatever else we desire from causes unknown to us. Is man's hunger for security a symptom of "childishness," in an opprobrious sense? Of course, it is more easily observable in the child than in the grown man. But the inference then is surely this, that it is one of those innate and basic instincts, like hunger, thirst or the sense of pain, with which he can preserve himself in the turmoil of the physical world. An adolescent's appetites are always stronger, less controlled, than an adult's. As a man grows, and his instincts are tamed and ordered by his reason, they serve him and society better than they did in their early exuberance. But this is not to condemn them, in their nature, as childish, non-adult or unhealthy. Civilisation is largely the subjection of instinct to reason;[19] but this is a process of subordination, not one of destruction. To suggest that such a rooted instinct is bad, and

[18] See the works of the poet Wordsworth, *passim*, and especially the "Ode on the Intimations of Immortality."

[19] Mr. Frank, at p. 256, cites Holmes' belief in "the superiority of the artificial to the natural," which embodies the same idea.

should be eradicated, is to reduce the argument *ad absurdum*.[20] It is as if one were to suggest that, as a horse needs a bridle and a ship a rudder, we would be better without the animal and the vessel. It is to postulate work without material, government without subjects, form without substance.

Mr. Frank puts forward one of the very greatest American jurists, Mr. Justice Holmes, as "the completely adult jurist."

> "He has himself abandoned, once and for all, the phantasy of a perfect, consistent, legal uniformity, and has never tried to perpetuate the pretense that there is or can be one. He has put away childish longings for a father-controlled world, and it is for that reason, one suspects, that he has steadfastly urged his fellows to do likewise."[21]

He quotes in support of this many famous Holmes aphorisms: "The life of the law has not been logic; it has been experience"; "Certitude is not the test of certainty. We have been cock-sure of many things that were not so"; "A page of history is worth a volume of logic"; "General propositions do not decide concrete cases"; and many others. Holmes had in him that mixture of sceptic and poet which is chief among the ingredients of the philosopher.[22] His love of epigrams testifies to both elements in him.

Now the sceptic and the poet have much in common. One of the preoccupations of each is the vanity of human wishes, and the frustration, in a cruel world, of the idealism which we bring into it at birth. Poets and sceptics do not control human destinies —or, if they try to do so, it is bad satire and bad verse. The Fates and Furies, transience and death, the littleness of man in

[20] The absurdity can be seen in Demogue's view, cited by Mr. Frank at p. 226, that "clearness of ideas is more the need of the mind yearning for security than a representation of the complex realities of life." This is surely the fallacy of fallacies. What are the realities of life apart from the mind and its yearnings? This pseudo-objectivity, which aims to separate the channels of perception from the thing perceived, is the negation of the competence of the human mind to decide anything. If we cannot trust our own senses and instincts, we have nothing left from which to draw conclusions. The "complex realities of life" are made for us by our own subjective reactions and thought-processes. These are data, not hypotheses. To see the relation between the mind and what it perceives calls for a faculty more ultimate than thinking, a faculty which does not exist. This difficulty, often only dimly perceived, has vitiated human thought ever since the first philosopher began to speculate on appearance and reality.

[21] *Law and the Modern Mind*, p. 253.

[22] Compare Bertrand Russell, *Mysticism and Logic*, p. 1: "The greatest men who have been philosophers have felt the need both of science and mysticism: the attempt to harmonise the two was what made their life, and what must, for all its arduous uncertainty, make philosophy, to some minds, a greater thing than either science or religion." Of these "mutually contradictory tendencies, idealism and skepticism" in Holmes Mr. J. C. H. Wu writes: "Here we have a combination of Faust and Mephistopheles in one person." (*The Art of Law*, p. 136.)

a huge and unintelligible universe, these are the burden of their song. The poet is generally idealist, the sceptic generally not; but they share an awareness of the imperfection of life when measured by the perfection of the mind. Neither of them are forward-looking men: they observe, and reflect; they do not plan.

Was not this the stamp of Holmes? His philosophic mind perceived and dwelt upon individualism of intellect, men's faulty understanding of one another, and the many obscure and, in theory, illegitimate processes which must intervene between the judge's premises and his conclusion.[23] Judicial logic was bad.[24] But what was needed was better logic, not no logic at all. The enlightened candour of Holmes' writings shows how powerful judicial reasoning can be; and it is doing less than justice to a great man to allow his *weltanschauung*, with its emphasis on imperfections, to obscure this.

One of Holmes' most distinguished colleagues, Mr. Justice Brandeis, gives an illustration of a different and perhaps more practical type of mind. This contrast has been noticed by Mr. Max Lerner in an essay from which the following two passages are taken. Speaking of Brandeis he says—

> "He is himself one of the most a-philosophical of jurists—a thinker whose thought is always directed to eventual action, a judge in the great tradition of the Anglo-American case law who proceeds from the facts of the concrete case to a particular decision. . . ."

and

> "Keenly sensitive to discords in the social system, his mind inevitably seeks to harmonise the jarring elements. From the enriching experience of his long career he has learned to approach every problem with a view to a constructive solution, and he falls thus easily into the constructivist's belief that no differences can defy the efforts of the human spirit to resolve them."[25]

This emphasis on idealism is a good corrective to the critical restraint of Holmes. This is not to lessen its value, but simply to add background and completeness to the canvas on which the brush-strokes of Holmes, so bold and engrossing, tend to

[23] *Ibid.*, pp. 144 ff., the section entitled "The Need of Juridical Skepticism." This and the preceding reference are to the essay "The Mind of Mr. Justice Holmes."

[24] "Every year if not every day we have to wager our salvation on some prophecy based upon imperfect knowledge": Holmes in *Abrams* v. *United States*, 250 U.S. 616, 630.

[25] *Mr. Justice Brandeis* (ed. Frankfurter, 1932), pp. 10 and 38.

monopolise the attention of the eye. Brandeis knew that no effort was possible without a goal; Holmes saw how goals shift and disappear, and how rarely what is first aimed at is attained. But would Holmes have condemned the lawyer's innate hunger for an ordered and certain jurisprudence? Surely not.[26] He uttered sage warnings against the over-indulgence of the appetite, but it is impossible to think that he believed it bad. Mr. Justice Cardozo (to complete the great trilogy) may be allowed to add an appropriate last word. He writes[27]—

> "I know the common answer to these and like laments. The law is not an exact science, we are told, and there the matter ends, if we are willing there to end it. One does not appease the rebellion of the intellect by the reaffirmance of the evil against which the intellect rebels. Exactness may be impossible, but this is not enough to cause the mind to acquiesce in a predestined incoherence. Jurisprudence will be the gainer in the long run by fanning the fires of mental insurrection instead of smothering them with platitudes."

Could the position be more wisely or more elegantly summed up?

So certainty is our ideal, though probably unattainable; and being sure of this, we can afford to make concessions to the opposing school. But, as we have discussed the purpose of law, we must first pass to the second half of our enquiry.

B. The Extent to which Law, in Practice, Fulfils its Purpose

There is no doubt that great numbers of people have espoused the fallacy that law is much nearer to what it ought to be than in fact it is; and, equally, there is no doubt that the legal profession must bear most of the blame for having fostered these misunderstandings. Its members themselves would be the loudest protestants in that utopia which some of them have hinted already exists, where law is predetermined and exactly predictable.[28] For in that happy but distant land there would be no lawsuits, and consequently, at least on the practising side of the profession, no lawyers. Contested cases are the symptoms of the inherent imperfections in all legal systems; and, as we have

[26] Mr. Frank himself never examines what would be the consequences of abandoning the desire for certainty which he condemns as immature. He concentrates his criticism on the actual evils of its presence rather than on the benefits which might result from its disappearance. Consequently his strictures, like Holmes', seem to belong to the practical, not the idealistic, aspects of the subject. The legal anarchy which would result from an abandonment of our desire for certainty can be left to the imagination. Our pursuit of the ideal is admittedly at fault in places, and it is against these that attacks must be made—not against the ideal itself.

[27] *The Paradoxes of Legal Science*, p. 3.

[28] See *Law and the Modern Mind*, pp. 54–5 for some good instances.

already said, it is the preoccupation of lawyers with these particular phenomena that has led to confusion between the diseases and the constitution of society.

Many influences have combined in encouraging the propagation of "the basic legal myth" of certainty and predictability. In addition to the reason already discussed, Mr. Frank suggests the following as in greater or less degree contributory—

1. The religious impulse.
2. The aesthetic impulse. (A desire for symmetry or logical simplicity.)
3. Effect of professional habits.
4. The economic interpretation. (Conservatism; protection of vested interests.)
5. A human instinct to seek security and certainty (self-preservation).
6. A practical interest in peace and quiet.
7. Imitation.
8. Devotion to custom.
9. Inertia.
10. Laziness or physical fatigue.
11. Stupidity. "The essence of stupidity is the demand for final opinions."
12. Mental structure.
13. Language and word-magic.
14. The Barry-Watson theory.[29]

This is not put forward as an exhaustive list. But it is strange that it does not contain what is surely the most striking reason for the dissemination of the "predictability" theory: judicial abhorrence of responsibility. A judge is called upon to decide all kinds of hotly contested controversies; and this would be the most invidious of tasks if he could not "cover up" behind a doctrine proclaiming to the world that in fact he has little or no personal discretion, and that he is compelled by ineluctable logic to the conclusions which he reaches. English judges are especially shy of appearing to give arbitrary or unprecedented decisions. In America there is much less euphemism, thanks largely to the efforts of a handful of great jurists some of whose opinions have already been seen. The palpably political activities of the Supreme Court have made it impossible to cling to the hallowed idea of

[29] Mr. Frank's name for the theory that the desire for an immediate solution of ultimate problems is "an inescapable predisposition," resulting from intellectual fear analogous to that caused by loss of bodily support. The catalogue of contributory causes is in Appendix I.

the strictly "judicial" function, as preached by generations of lawyers in England. Everyone knows that, in construing the Constitution of the United States, the Supreme Court has put more into that document than it has got out of it. Only in this way could it be possible to live under an eighteenth century constitution which has suffered so few and so slight legislative amendments. The Court is in a real sense itself legislative, and has shown many of the characteristics of a directly law-making body.[30] It has split into factions;[31] it has not scrupled to reverse its former judgments and policies;[32] its yea or nea can decide the fate of statutes; and it is normally looked upon as an arm, and an active arm, of the sovereign political body.[33] Almost every week it is called upon to decide questions which would raise an English judge's hair on end; and it has dealt with them vigorously and, on the whole, successfully.[34] English judges shun political questions as they might shun the plague. But the justices of the Supreme Court have long been immunised, and have flung themselves with zest into political forays where the issue is, in a real sense, legislative and not judicial.

It is natural, then, that the judge's function has been approached with more candour in America than it has in England. But it is so different that it must not be thought that what is a pointed criticism on one side of the Atlantic will necessarily be so on the other. The English judge's abhorrence of responsibility is as strong as ever it was; and this is surely the most cogent among the reasons why, his wishes fathering his thoughts, he has generally pretended that the law is more perfect than it is. It is tedious, but not in any way remarkable, to hear the parent eulogise his own child.

However excessive this eulogy may be, it does not impair such good qualities as its object may have; and we must not

[30] Its jurisdiction over federal statutes alone involves it in legislative activity. See Kelsen: "To annul a law is to establish a general norm; for the abolition of a law has the same character of generality as to make it, being, so to speak, only the making with negative action—hence a phase of the legislative function. A court, then, which has the power to annul laws is consequently an organ of legislative power." (*Annuaire de l'Institute International de Droit Public*, 1929, 94.)

[31] Thus Professor Laski writes: "In the period, for example, from 1931 to 1935 it has always been possible to predict beforehand the view that would be taken by McReynolds, Butler, Sutherland and Van Devanter, JJ., to the constitutionality of New Deal legislation." *Politica*, Vol. 2, p. 122.

[32] The *locus classicus* on this subject is the opinion of Mr. Justice Brandeis (dissenting) in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U.S. 393, 405 ff., where he notes an impressive number of instances.

[33] The presidential privilege of nominating to the court is a very powerful weapon, though its use is jealously scrutinised by the Senate. President Roosevelt now has a majority of his appointees on the court.

[34] The qualification is necessary in view of some notorious political blunders, such as the Dred Scott case, (1856) 19 Howard 393.

under-estimate the success which has attended the assiduity of generations of judges who have brought certainty and order into the law. The cases where the law is reasonably certain are in an absolutely vast numerical majority over those where it is not.[35] Society is on the whole harmonious, and every member of it has clear ideas of what he may and what he may not do. Litigation is a quite exceptional event in the life of the average man, and its general volume is probably not increasing out of proportion to the very rapidly increasing complexity of modern legal systems.

For one coming from another field either to the practice or the study of law, surely the most impressive thing is the scientific form to which it has been reduced, the severity and exactitude of its processes, and its ability to provide formulae, mostly short and precise in language, by which millions of men and women unquestioningly regulate their commonest doings. The pursuit of certainty becomes more and more difficult as laws multiply and complicate themselves. Some day perhaps the position will approximate to that now to be seen in America, and we shall prospect uneasily for some new method of deciding cases. But the time is certainly not yet; and, by present indications, it belongs to the far distant future.

Of course, the reasons why perfect certainty in law is unattainable are coeval with legal thought itself. Aristotle's famous passage, dealing with the relations of law and equity, will bear re-quotation—

> "What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal, but about some things it is not possible to make a universal which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct: for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start."[36]

So law represents a kind of equilibrium between certainty and justice, and there can be no rule so good that some state of facts, imperfectly foreseen but falling within the general description,

[35] This is the justification for the opinions of Wurzel and Demogue, discussed by Mr. Frank at pp. 222–231, that the inherent uncertainty of law, if existent, should be concealed from the layman, as it is a social necessity to keep up the appearances of the traditional attitude. This is probably sound policy. For it will stop the public, at least, from perceiving and overemphasising defects in the legal system which they may be ill-qualified to judge. They will thus not be tempted into the pitfalls into which Mr. Frank himself has fallen.

[36] *Nic. Ethics*, V., 10 (Ross' translation).

may not some day destroy the balance, and require it to be struck again with a concession in justice's favour. But the instinctive trend towards fixed rules is so irresistible that it has swept with it into the realm of certainty a great number of the very principles which, at the time of their origin, were formulated because the rules of law were too certain. Dean Pound has called attention to this in his essay "The Decadence of Equity," stressing the development from:

> "the roguish equity of which Selden spoke, which varied with the length of the Chancellor's foot, to Lord Eldon's equity, which was made up of doctrines 'as well settled and made as uniform, almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case.'"[37]

Thus an individual judge will endeavour to keep the discretionary element in law within the narrowest possible limits. He prefers to think of himself as a cog in the judicial machine rather than as a wise, inspired lawgiver; he would rather be a Lord Eldon than a Solomon.

It would be foolish to dispute the criticism that there is much room in the judicial process for the idiosyncrasies of the particular judge to assert themselves. Propositions of logic cannot be manipulated like propositions of mathematics; and propositions of legal logic are still less reliable. There are indeed many cases where, precedent or statute being reasonably clear, it may be said that any two judges would reach the same conclusion. But a contested case, almost by definition, arises in one of the gaps in the piece-meal framework of authority. *Res integrae* are phenomena which are becoming rarer and rarer in the courts, but they will always appear sooner or later. Then we see the principles of uncertainty and individuality at work, and we may quote Holmes again: "In substance the growth of the law is legislative"; "Judges legislate interstitially"; their judgments are "the unconscious result of instinctive preferences and inarticulate syllogisms." Even then, the long and rigorous training of judges tends to create some degree of uniformity of outlook, though the "blinkers" which they generally wear, and always pretend to wear, have been removed. All that we have to bear in mind is that these cases are exceptional, and are growing more and more exceptional as the hitherto uncharted places of the law are brought more and more systematically under juridical survey.

There is no need, for our present purposes, to go deeper into

[37] 5 *Columbia Law Review*, 20, 25.

the thorny problem of whether in fact judges legislate or not. The more the writings on each side are examined, the more the question will seem one of pure logomachy, with the judges (denying, on the whole, that their activities can be called legislative) fighting a retreating action and having rather the worse of it. What we have tried to sketch is the position, under the attacks now being made on it, of the concept of legal certainty and the traditional ideals of jurisprudence. We are acutely conscious nowadays that we are living in a period of change, where the processes and successions are swifter and more confusing than any in the memory of recent generations. There is a temptation, in criticising our old institutions, to think that the pendulum is swinging violently from one extreme of its travel to the other, more violently than perhaps it is. Some of the onsets which have been made, for instance, on the position and purpose of law look like hastily-considered attempts to force the pace of such changes as are happening. It is fatally easy to take the part for the whole, the appearance for the reality, the exception for the rule. We must beware of imitating Bunyan's waterman, who spent his life looking one way and rowing the other.

H. W. R. Wade.

LEGAL ASPECTS OF INTERNMENT

THE internment of enemy aliens residing in this country has raised one of the greatest literary controversies of late years. There has seldom been any question of similar importance on which more speeches were made, more articles were published and more letters to the editors were despatched. It is significant, however, that while the moral side of the question, the possible repercussions of the present Government policy on public opinion abroad, and the methods by which that policy was put into operation were fully discussed in public, no attention at all was paid to the legal side of the problem. It is submitted that this aspect of the problem is sufficiently interesting not to be treated with such neglect.

Legally there are three different forms of internment which in the public debate have frequently not been sufficiently differentiated. Art. 18 B of the Defence (General Regulations, 1939, S.R. & O. 1939, No. 927 as amended by S.R. & O., 1939, No. 978 and 1681 and 1940, No. 681, 770 and 942) grant power to the Secretary of State for the Home Office to detain any person whom he has reasonable cause to believe to be of hostile[1] origin or associations or to have been recently concerned in acts prejudicial to the public safety or to the defence of the realm or in the preparation or instigation of such acts. The same power is granted with regard to members and active friends of organisations subject to foreign influence or control or in the control of persons who have or have had associations with persons concerned in the government of, or sympathies with the system of government of Germany and Italy. In all these cases the Secretary of State must be satisfied that it is necessary to exercise control over the person to be detained. Various safety valves are provided in favour of persons detained under Art. 18 B. The Home Secretary is under a duty to appoint advisory committees to which any person detained may address his objections to any orders directed against him. The Home Secretary shall make a report to Parliament at least once in every month in which the number of persons detained under Section 18 B as well as the number of those cases is to be mentioned in which he has declined to follow the advice of an advisory committee. Several hundreds of persons have been detained under these regulations. No general criticism appears to have been levelled against either the regulation itself or against its application in practice apart perhaps from the demand that a larger number of persons should be detained under Art. 18 B.

The second regulation enabling the Home Secretary to detain

[1] Not "enemy"!

persons is applicable exclusively to aliens. It is meant to give the Home Secretary power to detain persons whom he would otherwise deport, but whose deportation is impossible owing to war conditions. According to Art 12 (6) of the Aliens Order, 1920, the Home Secretary may make a deportation order either on a certificate to be given in certain cases by a court of law or in any case in which the Home Secretary deems it to be to the public good to make a deportation order against the alien in question. Where a deportation order has thus been made and in the opinion of the Home Secretary the deportation would be impracticable or prejudicial to the efficient prosecution of the war and the detention of the alien is necessary or expedient for securing public safety, the defence of the realm, or the maintenance of public order, an order for the detention of the alien may be made. It is not known how many persons have been detained under this provision, but their number appears to be modest. The persons thus detained have been brought to prisons and are kept distinct from the third and largest group, that of interned civilian enemy aliens.

As to this third group there is no statutory provision authorising their internment. The basis of the Home Secretary's power to exercise control over the persons of civilian enemy aliens residing in this country is to be found exclusively in unwritten law.[2] Before the Great War it could scarcely be said that the question was in any way settled amongst international lawyers. There was a rule of customary international law that civilian enemy subjects should be given a period of grace during which they had the possibility to return to their own country. Apart from that there existed a growing tendency to subject resident civilian enemy aliens to restrictions of ever growing severity. This tendency was of course due to the ever more "totalitarian" aspect of modern wars and to the correspondingly increasing possibility for civilians to help in or oppose the national war effort. It can scarcely be said that the Great War has established a fixed rule of international law on the point in question. In this country enemy aliens remained at first generally free and were subjected to wholesale internment only under pressure of public opinion after the sinking of the *Lusitania*. In France and Germany

[2] See on the following, *Oppenheim Leaterpacht, International Law*, Vol. 2, 5th ed., 1935, pp. 255, ff; *Fauchille*, Traité de droit international public, (8th ed. of Bonfil's Manuel) Vol. 2 (1921) pp. 55, ff; Pitt Cobett, *Cases on International Law*, Vol. 2, 5th ed., 1937, pp. 67–71; Sir Ernest Satow, "The Treatment of Enemy Aliens," *Transactions of the Grotius Society*, Vol. 2 (1917), pp. 1 ff; James W. Garner, "The Treatment of Enemy Aliens," *The American Journal of International Law*, Vol. 12 (1918), pp. 27, ff; *R. Kempner*, "The Enemy Alien Problem in the Present War, *The American Journal of International Law*. Vol. 34 (1940), pp. 443, ff.

enemy aliens were interned. In Portugal a wholesale expulsion was ordered. In Japan not even restrictions of movement were placed on German subjects who remained free even to conduct business as agents of German firms—this notwithstanding the wholesale internment of all Japanese in Germany. At a later stage various arrangements for an exchange of interned civilians were concluded between various belligerent powers. While it cannot therefore be said that there is as yet a settled customary law on the treatment of civilian enemy aliens, it is safe to assume that international law as such does not contain any rule which renders the wholesale arrest and internment of the resident enemy alien population clearly illegal with the exception, of course, of any special protection granted to enemy aliens by international treaties or conventions.

From the point of view of English constitutional law the enemy alien is in a still more unfavourable position. It has been repeatedly held that the writ of *habeas corpus* does not lie in favour of enemy aliens and that the control over their person in wartime belongs to the field in which the Royal prerogative is still unlimited.[3] The Aliens Restrictions Order, 1914, which forms the basis of the Aliens Order, 1920, contains a clear saving clause in favour of any powers possessed by the Crown *vis-à-vis* aliens before the coming into force of these statutory provisions.[4] It can therefore scarcely be doubted that from the point of view of constitutional law the administration is clearly not limited in the exercise of their powers. The Home Secretary may deal with enemy aliens in accordance with his free discretion. The appointment of "tribunals" classifying aliens into three groups, the issue of "White Papers" laying down specified grounds for exemption from internment and release and the introduction of some rudimentary forms of procedure to deal with such questions are limitations of his discretion which the Home Secretary has voluntarily imposed upon himself and from which he is free to deviate not only generally, e.g. by withdrawing or altering any "White Paper," but also in individual cases while the "White Paper" from which he wants to deviate is still in force. If it is remembered that questions like an internment lasting for many months or even years are now being decided in thousands of cases without any oral hearing, without any possibility for the internee to collect evidence and examine witnesses and, where his release is held up on "security grounds" even without his knowing any of the allegations made against him, it will easily be seen that the

[3] *Ex parte Weber*, [1916] 1 K.B. (C.A.) 280; [1916] 1 A.C. 421; *Ex parte Liebmann*, [1916] 1 K.B. 268; *Ex parte Freyberger* (1917), 2 K.B. (C.A.) 129.

[4] Sec. 1 (6), 4 & 5 Geo. 5, Ch. 12.

present state of the law shows all the well-known disadvantages of an undeveloped stage of "*droit administratif.*" That tens of thousands of persons, who have been found to be "refugees of Nazi Oppression" are now exposed to the hardships of internment and to all the arbitrariness connected with the present procedure of release has made an impression on public opinion which it is hoped should not remain without influence on the general problem of administrative law.

It is strange to notice that in the public debate on the problems arising out of the internment of thousands of genuine refugees the Convention concerning the Status of Refugees coming from Germany of February 10th, 1938,[5] has not been given any attention. It was not even once mentioned during the two lengthy debates on the Government's policy in the House of Commons. So low has the respect for everything fallen which hails from Geneva that after two years and a few months it has sunk into complete oblivion! The Convention of 1938 is indeed a typical Geneva-Work, which means that it is rich in high-sounding phrases, but poor in tangible results. Still it contains one or two provisions which appear to have a bearing on the position.

Art. 2 reads as follows—

> "Without prejudice to the power of any High Contracting Party to regulate the right of sojourn and residence, a refugee shall be entitled to move about freely, to sojourn or reside in the territory to which the present Convention applies, in accordance with the laws and internal regulations applying therein."

It has to be admitted that the wording of the provision is somewhat cryptic. It certainly stipulates a right to free movement on the part of the refugee, but the part of the sentence beginning with the words "without prejudice" and ending with the word "residence" takes something away from this right and it is difficult if not impossible to say exactly how much is thus taken away. It is however not easy to imagine that it was the intention of the High Contracting Parties to say no more than the triviality that the refugee should be entitled to move about freely and to sojourn or to reside except when it was forbidden to him to do so. That would mean that Art. 2 of the Convention had no meaning either in law or in fact at all. This interpretation is all the less credible as Art. 2 was obviously intended to be of paramount importance. It follows immediately upon the definition of the term "Refugee" and fills the entire Chapter II of the Convention. Even in the most cautious interpretation it would appear that it must have provided at least one thing in favour

[5] Série de Publications de la Société des Nations, C. 75, M. 30, 1938, XII.

of the refugee: that he should not be imprisoned and interned solely on the ground of his being or having been a national or a resident of Germany. If this is not conceded, then Art. 2 would be a legal absurdity of the very first order. If it is conceded, then the present Government policy of indiscriminate internment of 23,000 male refugees solely on the ground of their present or former nationality would appear to be at variance with the Convention. As against this it cannot be argued that this would deprive a belligerent state of a right which on security grounds is indispensable: the Convention applies to genuine refugees (who are laboriously defined in Art. 1 of the Convention) only and each of the High Contracting parties can require proof in every individual case that a person is a genuine refugee before he or she is treated as such. But it cannot be in accordance with the Convention that persons are interned for an indefinite period just because they are refugees from Germany. It appears that however uncertain it might be to what extent Art. 2 intended to provide protection for refugees, it must at least have been intended to protect them against an internment based on no other charge than that constituted by their being refugees from Germany.

In this connection it is not without interest to compare another section of the Convention with one of the provisions of the Government's White Paper. Art. 5, Subsections 1 and 2 of the Convention reads as follows—

> "In every case in which a refugee is required to leave the territory of one of the High Contracting Parties to which the present Convention applies, he shall be granted a suitable period to make the necessary arrangements. Without prejudice to the measures which may be taken within any territory, refugees who have been authorised to reside therein may not be subjected by the authorities to measures of expulsion or reconduction unless such measures are dictated by reasons of national security or public order."

The second subsection is according to an express reservation made by the British Government not applicable to refugees admitted to this country for a temporary visit or purpose. It is, however, applicable to all those admitted otherwise than for a temporary visit or purpose.

In the former issue of the White Paper on German and Austrian Civilian Internees[6] the procedure with regard to the release of German and Austrian internees about to embark for emigration overseas was described as follows (No. 17 of the White Paper)—

> "Releases are not granted pending emigration. The pro-

[6] Cmd. 6223.

cedure is as follows: Facilities are given for the attendance of internees, who have United States quota numbers, at the American Consulate General for the necessary interviews. When a visa has been granted and a passage has been obtained, the alien is taken to the port of departure. Consideration will also be given to the cases of those who have made arrangements to emigrate to other countries."

It will have to be remembered that this provision applied in the first instance to Germans and Austrians in Category "C" i.e. to genuine refugees. There is no grant of any "suitable period to make the necessary arrangements"—an omission which in the present writer's experience has been a great hardship on a good many refugees. It will appear difficult to argue that this provision of the White Paper is in harmony with the Convention. It may, of course, be said that a refugee who is being interned is not one who is "required to leave the territory," but this objection would certainly not hold good in all those cases in which emigration is the only way in which an internee can obtain his freedom. These cases form the overwhelming majority of all those cases in which internees desire to emigrate. After all, the Convention does not describe the way in which an internee may be required to "leave the territory." Which stronger way to require him to do so can be imagined than the announcement that he will be interned for an indefinite period if he does not emigrate?

In the recent revised issue of the White Paper (October, 1940)[6a] the second sentence has now been amended and reads as follows—

"When a visa has been granted and an exit permit has been obtained, the alien will as a rule be released to make his final arrangements for departure."

One may very well speculate as to whether or not this alteration was due to the desire to comply with Art. 5 of the Convention, to which the attention of the Home Office had meanwhile been drawn.

The Convention contains no reference to the office of the High Commissioner for Refugees, established by the Council of the League of Nations in 1933. Its administration by the High Contracting Parties is, however, surely part of that official's functions. The office of the High Commissioner has a rather unfortunate history. Its first holder, Mr. James G. Macdonald, an American, resigned his office on the ground that he saw no way to help those whom he had been appointed to help. Later holders of the office have been considerably less outspoken. The present internment policy has not even given rise to a public protest or any publicly known representations by the present

[6a] Cmd. 6233.

holder of the office. By accepting a seat on the Committee, appointed by the Home Secretary to make proposals for amendments of his "White Paper," the present High Commissioner seems to have demonstrated that there is no disagreement in principle between his official views and those of the Government. This is, however, no consideration relevant in connection with the question whether the internment of German and Austrian nationals as practised at present is or is not in conformity with international law. That question cannot be decided by the attitude of the present High Commissioner. It is submitted that the answer to it can only be in the negative insofar as genuine refugees from Germany and Austria are concerned.

This view finds its confirmation in a further consideration. International law does not object to the internment of enemy nationals, because it presumes that enemy nationals will be inclined to help their country because of their allegiance and in return for the protection which they enjoy from it. They enjoy that protection even during war time and during the period of their residence in the territory of their country's enemies, because a belligerent government may always arrange for an exchange of internees with its opponents. This was done during the last war. Refugees, however, are persons who—in the words of the 1938 Convention—do not enjoy the protection of the German Government. An exchange between them and British internees in Germany is out of the question. In no case would it lead to a result which would be welcomed by any genuine refugee. In all probability it would mean a still further very considerable deterioration—to put it mildly—of their situation. International law knows no precedent for the internment of enemy nationals who are not enjoying the protection of their own country. During the Great War a number of persons were interned who as individuals may not have enjoyed the protection of the country of their nationality. This is, however, scarcely a precedent for the internment of refugees, who are excluded from their country's protection not as individuals, but as a group, which has already been accurately defined by an International Convention. Under this aspect it appears doubtful whether the rule of international law permitting the internment of enemy aliens can be applied at all to genuine refugees. In any case the existing doubt with regard to the extent of an already doubtful rule of international law may be considered as a further ground in favour of the interpretation of the International Convention, submitted by the present writer.

The attempt to distinguish legally between several groups of aliens is not without precedent in English law. It is significant that a differentiation which if consequentially applied would lead

to juster and more reasonable results was first attempted not by the legislature or the administration, but by the ordinary courts. In *R.* v. *Friedman*[7] a Russian had been recommended for expulsion upon having been convicted of receiving stolen goods. He appealed successfully against the recommendation for expulsion, the Court of Criminal Appeal holding that he was an alien only in a technical sense, as he had lived in this country since the age of five and could not speak Russian. It is suggested that a similar distinction between persons who are really enemy aliens and those who are so in a technical sense only would meet the case of the refugees from Nazi oppression. During the present internment wave, however, not only was there no distinction being made between refugees and real enemy aliens, but even the distinction introduced by *Friedman's* case was not adhered to and persons were interned who were even aliens (as distinct from enemy aliens) only in a technical sense. In a number of cases Galician Jews who have lived in this country practically all their lives were interned because they were technically still Austrian subjects and therefore German nationals, although they would have become Poles had they continued to live in the country where they were born instead of living in this country.

While in the case of these persons it must be admitted that the internee possessed at least the enemy nationality required by the customary rule of international law, in a number of cases internments have taken place which it is difficult to justify as falling under that rule. Of the about eighty Danzig citizens between ten and fifteen appear to have been interned in the course of the general internment of German and Austrian nationals, i.e. not in accordance with either Art. 18 B of the Defence Regulations or with Art. 12 (6) of the Aliens Order, 1920. Citizens of the Free City of Danzig whose independence and constitution are guaranteed by the League of Nations are of course not enemy subjects. The forcible "union" of Danzig with the Reich has no more altered their status than has the occupation of Belgium, Holland, Czechoslovakia, Norway, Luxemburg and Poland affected the status of the nationals of these countries, because the Government of this country has never recognised these territorial changes. It is particularly regrettable and ironical that the President of the Jewish Congregation of Danzig should be among the persons who were thus interned.

A number of other persons have been interned who in law are stateless. They are persons who have been deprived of their German nationality by decree of the German Government.

[7] [1914] 10 Cr. App. Rep. 72.

Some of them were Jews who had obtained German nationality by naturalisation and whose naturalisation was cancelled as part of the German "racial" policy. Others had been deprived of German nationality as being enemies of the Nazi regime or as offenders against the stringent rules of German tax legislation and currency control which proved fatal to so many thousands of emigrants since 1933. In a number of cases the denationalisation was due to the desire of the German Government to obtain the enjoyment of funds left by these persons in Germany. Under German law property of a denationalised person can be confiscated[8] and the Nazi Government found in the denationalisation an easily accessible way to obtain much needed funds. It is not known to the present writer whether the internment of persons in this category was due to general orders or whether it constituted an *ultra-vires* act on the part of the subordinate officers. If the former of these two alternatives should be correct, it might be thought that the internment of these persons might be justified by Art. 21 of the Aliens Order 1920, which reads as follows—

> For the purpose of this Order—
>
> 1. When an alien is recognised as a national by the law of more than one foreign state or where for any reason it is uncertain what nationality (if any) is to be ascribed to an alien, that alien may be treated as the national of the State with which he appears to be most closely connected for the time being in interest or sympathy or as being of uncertain nationality or of no nationality.
>
> Provided that where an alien acquired a nationality at birth he shall (unless the Secretary of State otherwise directs either generally or in the particular case) be deemed to retain that nationality unless he has subsequently acquired by naturalisation or otherwise some other nationality, and is still recognised by the Sovereign or State whose nationality he has acquired as entitled to protection.
>
> 2. Where an expulsion order under the Aliens Act, 1905, or any deportation order under the principal act is in force against any person that person shall, unless the Secretary of State otherwise directs, be deemed to retain his nationality as at the date of the Order notwithstanding any intervening naturalisation marriage or any other event.

On further consideration, it will, however, appear that Art. 21 has no bearing on the question at issue. It is expressly stated

[8] Gesetz über den Widerruf von Einbürgerungen und die Aberkennung der deutschen Staatsangehörigkeit (Law about the revocation of naturalisations and about the cancellation of German nationality) of July 19, 1933 (*Reichsgesetzblatt*, I, p. 780), 2.

in its text that the provisions contained therein are made "for the purpose of this Order" only. The power of the Home Secretary to intern enemy aliens is, however, not derived from the Aliens Order and the rules of Art. 21 have therefore no bearing on it. Furthermore Art. 21 refers to the cases of *sujets mixtes* and of persons of uncertain nationality only. It contains no provisions regarding persons of no nationality. In this connection it is of importance to note that the half sentence beginning with the word "provided" does not contain an independent rule but is merely a proviso, affixed to the main rule contained in the first part of the sentence. It is therefore also applicable only to *sujets mixtes* and to persons of uncertain nationality, from which it follows that it does not govern the cases of these German apatrides. For these reasons it is submitted that the Home Secretary has no powers to intern these persons apart from those powers granted to him by Art. 18 B of the Defence Regulations and by Art. 12 (6) of the Aliens Order, 1920.

It may be permitted to close these short remarks with a reference to a curious discrepancy between the attitude of the Home Office and that of the Exchange Control of the Bank of England. As was already stated many refugees will have no other choice than either to remain in internment for the duration or to emigrate overseas provided the regulations are permitted to stand as at present in force. It should therefore have been expected that their emigration would be facilitated as much as possible. The opposite, however, is true as far as the financial side of the question is at issue. By a Notice[9] dated 3rd of August, 1940, the Bank of England has informed all banks and bankers that refugees are to be regarded as residents of this country from the date of their arrival and that the transfer of their gold, foreign currencies or registered foreign securities outside the sterling area will be allowed only if they leave within six months of their arrival. If they stay in this country for more than six months, as many of them must owing to the difficulties in obtaining visa and shipping accommodation—difficulties which in many cases are multiplied by the internment—they are reimbursed for certain of these foreign holdings, but "any Sterling balances then remaining would continue to be treated as 'resident' and no transfers outside the sterling area would be permitted for any purpose whatever." Furthermore, "any sterling securities still held would not be saleable without a licence which would normally be refused." These unfortunate people find themselves therefore between the Scylla of indefinite internment and the Charybdis of going overseas practically without means.

E. J. COHN.

[9] F.E. 83.

OUR ARCHAIC FORMS OF EXECUTION

In a paper prepared for reading at the Provincial Meeting of the Law Society at Worthing in September last, entitled "The Enforcement of High Court Judgments," Mr. George E. Hughes has made some valuable criticisms and suggestions with regard to the existing system. He deals mainly with the moneyed debtor who has lost a High Court action involving a considerable sum of money. He points out that there is no reason why such a defendant should not take the precaution of placing his assets in a liquid and portable form and in times of peace leave by the night sleeper for the Continent. Some weeks or months may elapse before costs are taxed, and in the meantime, even if the defendant has not departed abroad, he can successfully hide away such assets as he has. A judgment summons rarely produces any useful information, a *fi. fa.* duly returns with *nulla bona*, the flat and furniture belonging to the wife or a third party, while procedure by elegit has been the subject of representation by the Law Society to the Lord Chancellor in 1935 on the ground of its cumbersome nature, but without result.

The remedy suggested by Mr. Hughes is that upon judgment being given against him the defendant's passport should be automatically withdrawn and the judgment should be registered, whereupon a department in the nature of an amalgamation of the offices of Sheriff and Official Receiver should seize the defendant's bank book, securities and papers and full disclosure of the debtor's position should be officially enforced. It would seem sufficient if the Court had power upon application on or at any time after judgment to suspend the debtor's passport, rather than that such suspension should be automatic. The difficulty presented by taxation of costs could be avoided by allowing a separate execution for costs. It would also appear that any departmental action such as is suggested should only be available as a last resort upon the defendant failing to attend or appearing unsatisfactory upon a judgment summons. In these days of bureaucratic activity the liberty of the individual must as far as possible be preserved.

The law as to enforcement of judgment debts is, however, in urgent need of reform. Most persons will agree with Mr. Hughes that the sheriff and all his works are a useless anachronism. The fact that the sheriff cannot sell the goods of a third party, including those of the debtor's wife, or those on hire purchase or under a bill of sale, makes the issue of a *fi. fa.* a leap in the dark which often rebounds upon the creditor in the shape of costs of an abortive execution, which cannot in any event be recovered from the debtor. We no longer need a mode of execution with a procedure much as it was in the thirteenth century. The man in possession should have disappeared with the debtors' prison. Whether or not the practice of walking possession will lessen as a result of the case of *Day* v. *Davies*, [1938] 2 K.B. 74[1]; where the Court of Appeal held that, as regards distress, a bailiff is not in such cases entitled to possession fees, remains to be seen. It is still in the interests of the sheriff's officer to produce an agreement between debtor and creditor for him to remain in possession as long as possible. Because of this practice it has been held that possession fees for twenty-one days only shall be chargeable against the goods in case of bankruptcy of the debtor within three months.[2] If possession is held for

[1] Also 107 L.J., K.B. 696; 158 L.T. 306; 82 S.J., 256; 54 T.L.R. 488, [1938] 1 A.E.R. 686.

[2] *Re English and Hayling, Ex parte Murray & Co.*, [1903] 1 K.B. 680.

twenty-one days the costs of a judgment and sale by *fi. fa.* on a debit of £41 recovered by judgment in the High Court in default of appearance amount to about £32, and for a similar recovery of a debt of £21 in the County Court amount to a sum equal to the debt itself. The furniture is sold without much advertisement, usually on the premises under bad conditions, and realises less than half its value.

All this archaic fuss is usually of no permanent value except in small cases as a creditor is not entitled to keep the proceeds of a *fi. fa.*, unless he has completed it by sale before a receiving order in bankruptcy is made against the debtor, or before the creditor or the sheriff has notice of the presentation of a bankruptcy petition by or against the debtor or of his commission of any act of bankruptcy; and where the execution creditor has received any money or benefit under an uncompleted execution he must hand over to the trustee in bankruptcy the benefit so received.[3] Also, in the case of an execution where the total amount levied including fees exceeds £20 where the goods are sold or the debtor pays the money to the sheriff, the latter must retain the money in his hands for fourteen days from the date of sale or payment, and if within that time he is served with notice of the presentation of a bankruptcy petition by or against the debtor and a receiving order is made thereon, the sheriff must pay the moneys in his hands less his fees and expenses to the trustee in bankruptcy.[4]

In practice, therefore, execution by *fi. fa.* only comes to a successful conclusion: first, where the debtor can still raise money and pays to avoid it, in which case, where the debt is over £50 the same result could have been achieved by the issue of a bankruptcy notice; and secondly, in small cases where it is worth nobody's while to put the matter into bankruptcy. In any other case, as where there are several creditors for amounts over £50, they all get to know of the levy of an execution, others immediately levy and those who are too late present a bankruptcy petition to prevent any creditor getting paid in priority to themselves. The sheriff's fees of two or more successive executions and a distress warrant have then to be paid. Hence the whole procedure by *fi. fa.* is archaic in conception, expensive for all parties in practice, and quite unnecessary, the results being obtainable in other ways, i.e. by bankruptcy or by judgment summons.

In the case of large debts the cost of seizure and sale are not unreasonably great, but in the case of small debts, such as those under £50, the costs are exorbitant. Under the present law the only articles of the debtor exempted from such seizure are wearing apparel, bedding and the tools and implements of his trade not exceeding in value £5,[5] and the same general rule applies with regard to distress.[6] This is entirely contrary to our modern notions of what is right and decent. If this system of execution is to remain at all then the value of the goods to be left should be at least £30 and not £5.

Procedure by judgment summons must now be examined from the angle of ordinary debt collecting, for if the *fi. fa.* is to be abolished, something more efficient than the present practice of the judgment summons must be established.

[3] Bankruptcy Act, 1914, ss. 16 (18), 40, 41 (1), 130.
[4] *Ibid*, s. 41 (2).
[5] 8 & 9 Vict., c. 127, § 8.
[6] County Court Act, 1934, § 121.

What actually happens, at any rate in the County Court, is something like this. The judgment creditor's solicitor, finding that the debtor does not pay the judgment and perhaps having made inquiries which appear to indicate that execution might prove abortive, issues a judgment summons to be heard at the next monthly County Court. At the hearing the debtor does not appear. The creditor does not appear either. He may be an important business man and does not wish to waste either his time or that of his clerks at the County Court. Nor have any further inquiries been made as to the means of the debtor, and the solicitor asks that the summons may be adjourned as his client relies for his proof of means on his right to cross-examine the debtor, and the case is therefore adjourned. At the next County Court, a month later, the debtor again does not appear and the same farce takes place, except that this time the judge shows some irritation, and will probably instruct the Court to inform the debtor that if he does not appear next time he will be fined. The next time the debtor may appear or he may send some excuse to the Court, such as that he is in employ and he dare not ask his employer to get off. If this is the case the judge probably fines the debtor £1 and he is informed that if he does not appear at the next Court he will be committed for contempt. None of this helps the judgment creditor in the least. Ultimately when the debtor does appear the judge makes an order for the debtor to pay by certain instalments, assuming that means are proved, with an order for the debtor's committal in the event of his failure to pay. In cases where no instalment order has been made at the time the judgment was obtained, the judge first makes an Instalment Order and next time when the Order is not fulfilled makes a Committal Order suspended provided the debtor pays the sum or varied instalments. It is quite usual for 100 or more of these judgment summonses to be heard at the commencement of each sitting, thereby wasting the time of the Court.

The following rules would make the judgment summons effective. The creditor should before he is entitled to issue a judgment summons, swear an affidavit that he has reason to believe that the debtor has means to pay either the whole debt or by instalments, and indicating the evidence he has to show such means. This would place the onus of making previous inquiries on the creditor and prevent the service of judgment summonses on people who turn out to be unemployed with a wife and several children to keep, which are purely a waste of time and money. That these inquiries can be made without difficulty can be seen from the inquiries made by omnibus and insurance companies leading to remission of tort actions to the County Court.

Secondly, if the debtor does not appear at the Court in answer to the judgment summons he should be fined on the first failure to attend with a warning that if he does not appear at the next hearing he will be imprisoned for contempt, and on his failing to appear the second time he should be arrested and imprisoned accordingly and then brought before the Court at the third hearing to be cross-examined as to means. There is no reason why the order of the Court to attend should be flouted in the way it is. If it were once known that the order had to be obeyed debtors would turn up automatically.

Thirdly, if the debtor does not attend at the first hearing and the judgment creditor does not produce any evidence of means, the summons should be dismissed for lack of evidence, and the creditor should not be entitled to issue a further judgment summons for the same debt for six

months. In such circumstances creditors would produce evidence or refrain from issuing the summons.

In practice the most effective result of the judgment summons is that the debtor often agrees with the creditor to pay a specified sum on account of the judgment rather than appear in Court, the summons being either withdrawn or adjourned. In larger cases a more potent remedy is the threat of bankruptcy proceedings; and this threat, coupled with an improved form of judgment summons and the other existing forms of execution is all that is necessary for ordinary debt collecting. Procedure by *fi. fa.* is unnecessary and should be abolished.

Most of what has been said with regard to execution by *fi. fa.* applies with equal force to distress. Is it in accord with our modern ideas of fairness and proper use of money and property that a landlord shall be entitled, the very day after rent is due and without demand for the rent, to put in the bailiff and seize and sell the tenants' goods in default of payment of rent? Not that most landlords do this, but they have the power to do so. It is again not right that wealthy landlords should sell up the goods of poor tenants. Further, can it ever be right for the owner of a house whether he be rich or poor to sell up his fellows in this way?

At the present time where a tenant is in arrears the landlord usually waits till arrears for a month or much more have accumulated, and if there appears to be insufficient goods for distress, or the landlord does not care to use such methods, or he wants to get a bad tenant out, he usually has to take out a summons for possession in the County Court, which must be served 21 days before the next Court; so that six weeks may easily elapse before the case is even heard, or ten weeks where there is no Court in August, and the Judge then gives judgment for possession in a month when the tenant pleads he has nowhere to go. If the tenant will not go, execution must be issued. The County Court bailiff or sheriff is compassionate and usually dallies considerably so that it is often well over three months from the issue of the summons before possession is obtained.

The tenant owing rent can be given the usual notice to quit in the case of a weekly tenancy. In tenancies for a month or longer there should be power to give a week's notice if the rent is more than 21 days in arrear in all cases, and not only in those tenancies drawn by solicitors where the power is inserted in the agreement; and there should be a cheap and easy method of obtaining such possession, in lieu of the lengthy proceedings available to-day. So long as proceedings for eviction of a tenant who does not pay his rent may take three months, as they do to-day, some arbitrary method of obtaining payment by distress may be necessary; but there is no need whatever, save in case of emergency such as the present war, why an immediate eviction order should not be available as of course, on application to the next County Court, where the tenant can be heard, provided seven days' notice of application be given to the tenant, he being not less than three weeks' rent in arrear at the date of notice. There must of course be proper safeguards to prevent snap forfeiture of leases. Rent should be obtained from the tenant in the ordinary way as a debt.

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CHOICE OF LAW IN ACTIONS *EX DELICTO* UNDER SCOTS LAW

In supplement of Mr. A. H. Robertson's article on "The Choice of Law for Tort Liability in the Conflict of Laws" in the July, 1940, number of THE MODERN LAW REVIEW, a note on the Scottish cases on the subject may be of interest, especially as in the most recent case of *Naftalin* v. *London, Midland and Scottish Railway Co.*, 1933, S.C. 259 (in which the previous authorities are discussed), the words "not justifiable" were interpreted as meaning "actionable." This case also supports his criticism of the decision in *Machado* v. *Fontes*, [1897] 2 Q.B. 231.

Naftalin's case was an action by a father for damages for the death of his son who was killed in a railway accident while travelling from London to Glasgow. The son's ticket was purchased in Glasgow but the accident occurred in England. The father claimed damages in respect of (1) pecuniary loss and (2) solatium or injury to his personal feelings. By English law the only remedy competent was that given by Lord Campbell's Act (9 & 10 Vict. Cap. 93) to the personal representatives of the deceased for pecuniary loss. It was held on appeal (reversing the decision of the Lord Ordinary) that the pursuer was not entitled to damages in respect of solatium as the rights of the parties fell to be determined by the law of England as the *lex loci delicti*, and that the right to claim solatium was a substantive right, distinct and separate from the right to claim in respect of patrimonial loss.

This case is interesting as the act complained of was not only not justifiable but indeed actionable both by the *lex loci delicti* and the *lex fori*. It was held, however, that as the right of action conferred by the *lex loci delicti* was less extensive than that conferred by the *lex fori* the pursuer was restricted to the rights conferred by the *lex loci delicti* which regulated the rights arising from the tortious act.

The Lord Ordinary decided in favour of the pursuer on the ground that, once it was admitted that the act giving rise to the action was wrongful both by the *lex fori* and the *lex loci*, it was for the former law to determine the different elements of the claim of damages since this question related to the remedy rather than to the right. The Inner House, however, reversed the decision of the Lord Ordinary. Lord Anderson (at p. 270) laid down the following propositions: "(1) That a claim for damages based on solatium is a substantive and independent *jus actionis* and not a mere head or item of damages; (2) that, if the *lex loci delicti* does not recognise such a right, the Court of the *forum* is debarred from awarding damages as for solatium" (*Kendrick* v. *Burnett*, [1897] 25 R. 82). Lord Murray (at p. 273) said: "A claim based on solatium and a claim for reparation of pecuniary loss sustained appear to me to be distinct and separate matters. If no *jus actionis* is conferred by the *lex loci* in respect of the former, it is not, in my judgment, for the *lex fori* to create it. In England the former involves no *'damnum'* at all. And, after all, a claim for damages is merely an accessory to or consequent of the principal matter, namely, some *jus actionis*. Without such a *jus* it cannot arise, for there is nothing to which it can attach." The dictum of Lord Shand in *Goodman* v. *London and North Western Railway Co.* (1877), 14 S.L.R., at p. 451, was cited with approval: "But just as the *lex loci contractus* must be applied in reference to the terms and effect of the contract for the

purpose of ascertaining whether liability exists, so I think the *lex loci* must be applied with reference to the acts committed, in order to ascertain whether there be liability." Although *obiter*, this statement had already been approved by Lord President Dunedin in *Convery* v. *Lanarkshire Tramways Co.*, [1905] 8 F. 117.

The following passages from *Bar's International Law* (Gillespie's edition) which are directly in point were also cited by Lord Hunter at p. 266. "If the question is one of liability for damage done by . . . servants . . . it is obvious that the liability can never be broader or go further than the law of the place where the damage takes place permits" (at p. 639); and "To determine the matter by the *lex fori* where the *lex loci actus* gives no claim or one that does not go so far, is utterly unjust, and all the more that it rests on the good pleasure of the pursuer in many cases whether the action shall be raised at this or at that place" (at p. 636).

The case of *Horn* v. *North British Railway Co.*, [1878] 5 R. 1055, which, in apparently deciding that the various elements in awarding damages related to the remedy and therefore fell to be decided by the *lex fori*, was direct authority in favour of the pursuer, was doubted as being contrary to the previous authorities and inconsistent with *Kendrick* v. *Burnett* (*supra*). The opinions in that case show some confusion of thought, the Lord Justice Clerk apparently overlooking that it was an action not upon contract but upon delict.

Lord Murray (at p. 274) further went on to comment on the case of *Machado* v. *Fontes* (*supra*) which had been founded on by the pursuer. After briefly narrating the facts his Lordship said: "They" (the Court of Appeal) "held that the act complained of being a wrong alike by the *lex fori* and the *lex loci delicti*, the rule of international law was *prima facie* satisfied. So far no exception can, of course, be taken to the judgment, which purports to proceed on the familiar cases of *Phillips* v. *Eyre* (1870), L.R., 6 Q.B. 1, and *The 'M. Moxham'* (1876), 1 P.D. 107. The rule being thus satisfied, the Court held that civil liability for damages in England followed as a matter of course. This upon the ground that 'damages' pertain to the 'remedy,' and are therefore exclusively a matter for the *lex fori*. With all respect to the learned judges, the conclusion does not necessarily follow from the premises. Neither *Phillips* v. *Eyre* nor *The 'M. Moxham,'* while they illustrate the rule of law, affords any warrant for the above conclusion; rather the contrary, for in both these cases the English action was dismissed upon the ground that no civil liability for damages in respect of the wrong complained of was imposed by the *lex loci*—see *Phillips's* case *per* Willes, J., at p. 29, and Mellish, L.J., in the *Moxham* case, at p. 113. In other words, inasmuch as the *lex loci* conferred no *jus actionis* upon the pursuer, no accessory claim for damages could accordingly arise. . . . In my opinion the views of the learned judges in *Machado's* case in regard to the matter of damages cannot stand with the decisions of our Courts in *Goodman*, *Kendrick* and *Convery* above mentioned."

In *Goodman* v. *London and North Western Railway Co.* (1877), 14 S.L.R. 449, the widow of a domiciled Scotsman brought an action of damages in Scotland in respect of the death of her husband in a railway accident in England. The action was raised three years after the accident took place. It was held that, the grounds of action having arisen entirely in England, the rights and liabilities of the parties must be regulated by the law of England, and that, as by that law the action was no longer maintainable

since the time limit of twelve months imposed by Lord Campbell's Act (9 & 10 Vict. Cap. 93) had expired, it must be dismissed.

Kendrick v. *Burnett*, [1897] 25 R. 82, was an action of damages for solatium in respect of deaths caused by a collision of two vessels on the high seas alleged to have been brought about by the fault of the defenders. It was held that as the defenders were English they were under no liability beyond that attaching to them by the law of England, and the claim for solatium therefore failed. Lord Kinnear said (at p. 90): "If the law of England gives the pursuers no right of reparation at all, or no right of reparation for wounded feelings, or anything else but pecuniary loss, I do not see how they can acquire other rights by any rule of our own law and practice as to the manner in which, assuming the right to be vested in them, the remedy ought to be administered."

Convery v. *Lanarkshire Tramways Co.*, [1905] 8 F. 117, was an action by an Irishman, whose son had been killed in a tramway accident in Scotland, to recover damages in respect of solatium for the death of his son. The defenders, founding on a remark of Lord President Robertson in *Kendrick* v. *Burnett* (*supra*), pleaded no title to sue, on the ground that the law of Ireland, the country of the pursuer's domicile, recognised no claim for solatium. It was held that the pursuer had a right to reparation depending solely on the law of Scotland, which was both the *lex fori* and the *lex loci delicti*. The Lord President, in commenting on *Kendrick* v. *Burnett* (*supra*), explained that the defender's plea was based on the mistaken idea that Lord President Robertson was speaking of the law of the domicile of the pursuer, whereas he was speaking of the law of the flag of his ship.

Reference may also be made to the case of *Rosses* v. *H.H. Sir Bhagvat Sinhjee*, [1891] 19 R. 31. This was an action by a woman for damages for seduction alleged to have been committed in England. The pursuer, however, failed on the ground that the act alleged did not constitute a wrong inferring a legal remedy at her instance by the law of England. Lord Trayner said (at p. 37): "I am satisfied, as I think all your Lordships are, both on principle and on authority, that an act, in order that it should give rise to action as being a wrong, must be recognised as a wrong giving rise to a legal remedy by the law of the place where it was committed. If that be so, then this action is excluded, for the act which is alleged as the foundation of this action was committed in England, and is not recognised by the law of England as a wrong, in the sense or to the effect of giving rise to a remedy. If it is not a wrong in that sense by the law of England, it can never become a wrong from the fact that the doer of it has since come to Scotland."

The decision in *McLarty* v. *Steele*, [1881] 8 R. 435, must, along with *Horn* v. *North British Railway Co.*, [1878] 5 R. 1055, now be regarded as of doubtful authority since it cannot be reconciled with *Kendrick* v. *Burnett* and the other authorities cited above.

F. E. O'Riordan.

STATUTES

The Treachery Act, 1940

Just over a century ago, the Criminal Law Commissioners, appointed to digest the English Criminal Law, remarked in the preface to their Fourth Report (1839): "The confusion of rules and principles in the definition of crimes and punishments by the common law, the inconsistencies and the contradictions of its provisions, and their frequent inapplicability to the requirements of a civilized nation, can hardly be sufficiently understood or appreciated by those who have not considered them attentively with a view to their systematic reduction. These defects are indeed the natural results of the history of our common law, the several rules of which being of miscellaneous origin—have undergone repeated revolutions by the slow process of time and gradual change of manners and customs, without any positive institution, and consequently are not bound together by any unity of design or any governing principle; and though the Legislature has frequently interfered to remedy partial defects, no attempt has hitherto been successfully made to improve the whole system. Indeed the amount of evil has been sometimes increased by the mode of correction applied by the Legislature. Statutes affecting the criminal law have, in all ages, from the Statute of Treasons down to our times, been passed much more to meet present emergencies and transitory circumstances, than with a view to improve the laws in general; they have been made, to use the language of Lord Bacon, 'on the spur of the times,' and very frequently without much consideration whether the common law was not sufficient without them. The consequence has been an enormous accumulation of particular laws, without system or principle, and many of them at variance with each other and the common law;—a proceeding which the same author characterizes as 'a continual heaping up of laws without digesting them, which maketh but a chaos and confusion, and turneth the laws many times to become but snares for the people.'"

This commentary has been deemed worthy of reproduction because so much of it is still relevant and because the greater part (but not the whole) of it is apposite to the enactment and the content of the Treachery Act, 1940. The occasion of it was "the inapplicability of the existing law" of treason to the requirements of our times. It is an "interference of the Legislature to remedy partial defects." Its enactment has not been made the occasion "to improve the whole system." It has been passed "more to meet present emergencies and transitory circumstances than to improve the laws in general." It represents the policy of "an accumulation of particular laws" and those "not bound together by unity of design or any governing principle." It was passed very much "on the spur of the times" and the spur, in this case, drove the willing pack-horse of Parliament to run at the speed of a race-horse. The Bill passed through all its stages in the House of Commons on 22nd May, 1940, and in the House of Lords in a few minutes on the following day. The Lord Chancellor prayed their Lordships to hurry so that the Royal Assent could be given that very evening.

The Act is an emergency measure in a double sense. It is a temporary Act, but a contemporary legal journal has suggested that "it may, however, prove to be so useful that its retention on the statute book will be longer than at present arranged for" (*The Journal of Criminal Law*, Vol. IV,

p. 304). If the suggestion is that *some* of the ideas embodied in the Act are worthy of perpetuation in a post-war revision of the whole law of treason, one that will reduce that "heap of particular laws" to order and design, it is unobjectionable. If it tends to encourage the perpetuation of the heap, with this addition on top of it, it is lamentable.

This measure is the creature of an emergency and that, despite the foregoing criticism, is its complete justification. The emergency was as grave as any this nation has ever known. The Act was passed in May, 1940, and none needs a reminder of the stark tragedies of that month when calamity after calamity moved grimly in a tide that bore onwards to the very shores of our narrow seas. Those were the days of treachery triumphant in Norway, Holland, Belgium, and France, when the craftiest of all enemies used his fifth-column, and the fear of the fifth-column, the creation of "alarm and despondency," the dropping of parachutists, and the fear of parachutists, and all manner of devilish strategems of treachery and sabotage as additional and most potent weapons in his vast arsenals employed to reduce free peoples into terror and subjection. Even in circumstances so conducive to pardonable rashness, the excesses of some officials and magistrates up and down the country were in a high degree censurable. But no fair reviewer of this Treachery Act can extend any of that censure to Parliament for its enactment of this measure. The recollection of the harsh necessities of the times must silence arm-chair criticism of its enactment and content. It was the creation of the Parliament of a free nation superbly determined, in an extremity of circumstances, to defend its liberties and its life. It is as such that it must be considered *at the present time.*

The Bill was sponsored in Parliament by Sir John Anderson and Viscount Simon. Their explanation of the need for the Act was that the early legislation of the war did not provide for the death penalty for acts done in breach of the defence regulations with intent to help the enemy because it was thought that the existing law of treason was adequate to deal with the more serious of them, but that, on reflection, and in the light of new developments, it was necessary to amend that view. The law of treason was sufficiently wide *in content*—and Sir John Anderson assured the Commons that nothing which was not clearly an offence under that law was to become an offence under this Bill. But the procedure in treason trials was antiquated, cumbersome and complicated, and ill-suited for the times. Viscount Simon went further and asserted that the complexities of the old procedure were "not really required in the interest of justice or fair play." (His great predecessor, Erskine, must have made a complete turn in his grave if he heard this remark, for he considered that the special procedure in treason trials "met the headlong violence of angry power by covering the accused all over with the armour of the Law.") Another gap in the law of treason, which had to be filled to meet the dangers of parachutists and of alien enemies infiltrated into this country in the guise of refugees or otherwise, was that it almost certainly could not be applied beyond British subjects and aliens who owed allegiance to the Crown. "It is a very doubtful question indeed whether under the existing law of treason you could proceed against an alien who has come here suddenly, surreptitiously by air or otherwise, for the purpose of wreaking clandestine destruction or doing other acts against the safety of the realm" (Viscount Simon).

The Act accordingly provides in s. 1: "If, with intent to help the enemy,

any person does, or attempts or conspires with any other person to do, any act which is designed or likely to give assistance to the naval, military, or air operations of the enemy, to impede such operations of His Majesty's forces, or to endanger life, he shall be guilty of felony and shall on conviction suffer death." In this section the following points are notable. First, the *mens rea* required is clear: "with intent to help the enemy." No act done without that intent comes within the offence of treachery. Second, the words "any person" cover all persons, of whatsoever nationality or allegiance, who commit the offence within the territorial operation of the Act as defined by subsequent sections. Third, the words "any act" raise the question whether wilful omissions done with intent to help the enemy (and some very mischievous conduct of that description can easily be imagined) should not have been expressly mentioned. Fourth, the clause "which is designed or likely to give assistance—[and/or] to impede" suggests that proof by the prosecution of the commission of such acts will raise a *prima facie* presumption of the existence of the required *mens rea* and will shift the burden to the defence either of disproving or raising a reasonable doubt about its existence. It is submitted that the commission of "an act . . . likely . . . to endanger life" will not *per se* raise such a clear *prima facie* case and that proof of the existence of the *mens rea* may in this case require stronger evidence by the prosecution than in the former two categories. Fifth, the penalty on conviction is fixed and not discretionary; the Act says "shall suffer death." In this respect the offence is made to resemble murder and treason and not the offences under the Dockyards Protection Act, 1772, where the judge has a choice between passing and merely recording the death sentence. In her essay on "The Trend of Criminal Legislation" in *Penal Reform in England*, the first publication of the Cambridge University Board of Research in Criminology, Miss Craven makes the following comment: "Slowly but surely parliamentary opinion appeared to be turning against the death penalty, witness the vote of the House of Commons in favour of abolition in 1938. It was, however, not yet ready to translate that vote of a small House into a law expressing the considered judgment of the majority in May, 1940, when under the stress of war and the struggle for national independence it extended capital punishment for certain offences of treachery and sabotage, thus reversing the trend of legislation of over a century and a quarter. It is significant that even in this crisis, the voices of several M.P.'s were raised in courageous protest on the ground that the death penalty gave no protection against treachery which was not equally provided by other penalties, and that a humane and progressive community could not preserve its own honour and dignity by resorting to barbarous methods." Apart from the debatable element in this commentary (rendered more debatable by the circumstances of our times), this statement, with respect, may mislead the unwary into thinking that capital punishment has been extended to cover new offences and not merely a new class of offenders. That deduction would be incorrect unless it is proved that some class of acts falling under the definition of treachery could not fall within the provisions of the existing law of treason relating to "levying war" and "adhering to the King's enemies." The German Government did indeed strongly contend that its fifth-columnists could not be shot under the rules of war. Its solemn adherence at all times to those rules reinforced its contentions!

The complexities of procedure are avoided by the provisions of s. 2 (1)

which provides that the offence is to be triable on indictment and that persons convicted of it are to be dealt with in like manner as persons convicted of murder. This avoids the special rules in the case of treason relating to the delivery to the prisoner of a copy of the panel of jurors, of a list of intended Crown witnesses, and of the indictment, as well as those relating to the wider right of peremptory challenge of jurors. A more serious matter is that it obviates the necessity of a technical minimum of proof by the evidence of at least two witnesses and that it avoids the time-limit of three years on prosecutions which exists in most types of treasons. The convicted prisoner has the slight consolation of knowing that the horrors of decapitation or public hanging are not even theoretically possible in his case!

The first proviso to this sub-section provides that, in the case of persons subject to what conveniently may be termed "military" law, the offence of treachery is included in the list of offences which "military" tribunals can try. There is nothing very novel in that. The second proviso is more remarkable; it enacts that *an enemy alien* may, if the Attorney-General so directs, be prosecuted for treachery before a court martial, whereupon the provisions of the Army Act shall apply for the purposes of his custody, trial, sentence and punishment as if he had been at the time of the commission of the offence a person subject to "military" law. This undoubtedly was enacted under the fear of an invasion and the interruption of the ordinary processes of the "civil" law courts. It will be observed that it only applies to *enemy aliens* (as defined in s. 5). British subjects, British "protected persons," and neutral aliens (not subject to "military" law) retain the right to be tried by jury. The third proviso gives the Secretary of State the discretion to order the shooting instead of the hanging of persons convicted of treachery who, at the time of the commission of the offence, were *members of the armed forces* of the Crown or of any foreign power, including an enemy power.

S. 2 (2) provides that ordinary ("non-military") prosecutions are not to be instituted except by or with the consent of the Attorney-General but that the preliminary processes of arrest, *etc.*, need no such prior consent. The remainder of the Act deals mainly with consequential matters. The joinder provisions of s. 3 (1) show that a charge of treason may not be joined in the same indictment with a charge of treachery. S. 3 (2) allows court martials to try "joinable" and joined offences although such offences would not otherwise be triable by "military" law. S. 4 may be of interest to constitutional lawyers. It provides that the Act is to apply to anything done (*a*) by a British subject elsewhere than in a Dominion, India, Burma, or Southern Rhodesia, (*b*) by a person subject to "military" law in any place whatsoever, and (*c*) by any person in the United Kingdom or in any British ship or aircraft not being a Dominion (*etc.*) ship or aircraft.

D. Seaborne Davies.

NOTES OF CASES

Company Amalgamation. Contracts of Employment

The facts in *Nokes* v. *Doncaster Amalgamated Collieries, Ltd.*, [1940] A.C. 1014, are far from exciting, yet the decision deserves pride of place in any textbook concerned with the "rights of man" in modern social conditions. The appellant had been a miner in the services of the Hickleton Main Colliery, Ltd. By an order of the Chancery Division made under s. 154 of the Companies Act, 1929, the employer company was, together with a number of other mining companies, amalgamated into the respondent company. All the old company's property, rights, powers, liabilities and duties were transferred to the respondent company, and the old company was dissolved. This order took effect on 4th June, 1937, but the appellant who knew nothing of the amalgamation (not to speak of the order of the Court and its legal implications) continued to work in the mine and to receive his wages until, on 7th October, 1937, he absented himself from work for one day (presumably in the course of a strike, though the report does not say so). When the respondent company tried to make him liable for damages under the Employers and Workmen Act, 1875, he argued that there was no contract between him and the respondents, and succeeded before the House of Lords (Viscount Simon, L.C., Lords Atkin, Thankerton, and Porter, Lord Romer dissenting) after having failed before all the judges previously concerned with the case.

Before the Companies Act, 1929, came into force, a company amalgamation, unless effectuated by an exchange of shares or by a sale under the memorandum of association, necessitated the winding up of the companies, which were to be merged in a new company. But under s. 154 of the Companies Act, 1929, the Court, *i.e.* a judge of the Chancery Division, may, either simultaneously with the order sanctioning the amalgamation scheme, or subsequently, transfer the whole or any part of its undertaking and of its property and liabilities from any transferor to the transferee company, and at the same time dissolve, without winding-up, the transferor company. The transfer order thus takes the place of the various assignments, conveyances, etc., which otherwise would have been necessary in order to vest the old company's assets in the new one. The question before the House of Lords was this: Is the section of a merely procedural character, does it merely simplify the machinery of transfer, or does it, in the words of Lord Romer, give to the Court the power "to transfer to, or vest in, the transferee company . . . property and rights of a transferor company which the latter company is itself incapable of assigning, or which it can assign only with the consent of some third party whose consent to the transfer has not been obtained"? And in particular: Does a transfer order operate as an assignment of contracts of employment which, apart from the transfer order, the transferor company could not have assigned without novation, *i.e.* without the concurrence of the other party to the contract, the employee?

The answer to this question obviously depended in the first place on the interpretation of s. 154. What is the meaning of "property" in the subsection dealing with transfer orders? There is what purports to be a definition subsection, defining "property" as "property, rights and powers of every description." This "definition" is not entirely meaningless. It

makes it clear, for example, as pointed out by Lord Porter, that a right to call up uncalled capital is transferred to the new company. Otherwise it would not seem to be either scientific or helpful. Viscount Simon was of the opinion that, on general grounds, a non-assignable asset like a right to the service of an employee, could not be described as "property," and Lords Atkin and Porter who agreed with this view pointed out that in those provisions of the Companies Act which dealt with the powers of liquidators to sell property the word property certainly did not include non-assignable assets and that there was no reason why the powers of the Court in connection with the dissolution without winding up should, in the absence of an express provision, be thought to transcend those of a liquidator. As against this, Lord Romer was of the opinion that an interpretation of s. 154 according to its purpose demanded the inclusion of non-assignable assets in the meaning of the word property. This purpose, so he thought, was expressed in subsect. (1) (*f*) which gives the Court the power of making provisions for incidental, consequential and supplemental matters which are necessary to secure, "that the reconstruction or amalgamation shall be fully and effectively carried out."

There was also a division of opinion as to the meaning of the word "transfer" which, as Viscount Simon pointed out, is not a work of art. Lord Romer emphasized that it was a transfer by the Court much in the nature of a vesting order, which included the transfer of liabilities. If, so ran the argument of Lord Romer's dissenting judgment, the word transfer here includes a transfer of liabilities which are not, of course, assignable without novation, then it may just as well include non-assignable assets. The very inclusion of liabilities in the transfer shows that the provision overrides the rights of third parties.

This line of reasoning, however, did not find favour with the majority. The construction of s. 154 adopted by Lords Simon, Atkin, Thankerton and Porter is remarkable for the principles of interpretation which especially the Lord Chancellor brought to bear on this question. "The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning. We must not shrink from an interpretation which will reverse the previous law, for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute, or, conversely, to prohibit results which would otherwise follow. Judges are not called upon to supply their opinions of sound policy, so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the Legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction, based on the view that Parliament would legislate only for the purpose of bringing about an effective result."

It was in connection with "fundamental principles" which the majority of the Lords and especially Lords Simon and Atkin found involved in this case that the majority decided to give s. 154 a narrow interpretation. It was recognised both by Lord Simon and by Lord Atkin that what was involved in this case was a "constitutional" issue. Was an employee of a

company to be deprived of his freedom of choosing his employer by having a new employer substituted for the old one, finding himself bound by a contract of employment with a person with whom he never chose to contract? The practical consequences of a decision in favour of an interpretation of s. 154 yielding this result might have been small, but the principle at stake was fundamental. "I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf." In these words Lord Atkin gave poignant expression to the legal axiom of the freedom of the contract of employment which is the basis of all modern social legislation.

One could conceive of a written constitution including a modern catalogue of the rights of man. The freedom of choosing one's own vocation and one's own employer would certainly have to figure in such a modern catalogue of *droits de l'homme et du citoyen*. What the House of Lords did in the case under review was to interpret a technical section of the Companies Act in the light of an unwritten principle of our social constitution, much in the same spirit in which they would have declared that section unconstitutional, if there was a written constitution embodying the freedom of the contract of employment, and if the power of judicial review was vested in the judges of England.

The *droits de l'homme et du citoyen* of the French and other continental constitutions as well as those rights of man which have found their way into the American state and federal constitutions are mainly designed to protect the individual against the overpowering might of the State. The freedom of contract which the House of Lords protected in the case under review was and is in need of being safeguarded not so much against the State as against the big industrial and commercial combines. This is particularly clear from the judgment of Lord Atkin. The learned Lord pointed out that the construction adopted by the lower Courts and by Lord Romer would bring about a revolution in the law and would lead to "one class of person—namely companies under the Companies Act—being able to shake off the obstructions which bind ordinary persons though only when they are minded to transfer their business to another and probably a larger company." And Lord Atkin could see no reason why this procedural section, "this beneficent procedure," "should be tainted with the oppression and confiscation which in some cases would certainly be caused, or why, in the interests of companies big or small, for the mere purposes of an amalgamation, it should violate all the rules as to transferability, depending on some occasions on principles of our law and on other occasions on contract." "It would possibly hurt the feelings of financial men with large organising powers and ambitions to know how strongly some people feel about big combinations, and especially amalgamations of small trading concerns." The majority of the Lords looked upon the attempt at overriding the non-assignability of contracts of employment very much as an endeavour of subordinating the freedom of the individual to the technical requirements of the concentration of capital.

In answer to this Lord Romer gave expression to the necessities of company practice and to what Lord Porter called the "ease of administration." Lord Romer pointed to the highly artificial character of the whole concept of corporate entity, and to the fact (already emphasised in the Court of Appeal) that through the play of the machinery of Company Law an entirely new factual employer can always be substituted by a change

of directors and shareholders and even the name of the company, while the legal employer remains the same. Lord Romer did not think that the great "constitutional" principle of the freedom of choosing one's own employer was more involved in this case than in those other cases in which admittedly the employee had no option but to submit to what was in fact, though not in law, the replacement of one employer by another.

Against these arguments of Lord Romer it might be said that what was involved in the present case not so much the practical implication as the principle. Given the principle of corporate entity and the, perhaps, exaggerated importance attached to it by Judges and text writers, there is a difference in principle between the substitution of one person for another, and a mere change in the personnel constituting the organs of the person. True it is, that distinction is very formal and, perhaps, artificial, but so is the freedom of contract itself, for which the majority of the House of Lords stood in this case. It is a question of *principiis obsta*. Freedom of contract, especially in matters of employment, is largely formal and fictitious. The discrepancy in bargaining power between employer and employee deprives the latter of the real enjoyment of that freedom which the law purports to grant him. This is almost common place. It is also common place that the Courts have done little if anything to help to adjust this inequality and that this task was left almost entirely to Parliament. The point at the present moment is, however, that further progress in the field of converting the employees' formal freedom of contract into a real one cannot be made by turning the clock back. We have to go through the conception of a formal freedom of contract and not to walk around it. It is very necessary to emphasise this at the present moment, when on the Continent the various Fascist systems are playing havoc with the employees' freedom of contract, purporting to achieve social progress while in fact degrading, to use Lord Atkin's words, the servant to a serf. At a moment like this it must be a matter of gratification that the House of Lords when faced with a technical question of Company Law, in itself of small practical importance, makes itself the champion of the liberal conception of the freedom of contract. This, it is true, if standing by itself and left unsupported by the conception of real equality, produces the legal pretext for the sanction of all kinds of exploitation, but without it modern society would relapse into serfdom and feudalism.

The trade union which obviously must have been supporting the appellant might well look upon the outcome of this case as a Pyrrhean victory. The position of the employees in a case of a company amalgamation has not been substantially improved by this decision, and it might even be argued that in its practical results it might be detrimental to their interests. It was emphasised by Lord Romer that in the old days before the coming into force of s. 154 the transfer of the assets by the liquidator operated as a summary dismissal of the employees of the undertaking. They had, of course, their claim for damages against the old company for which they could prove in the winding up. It must be assumed that a dissolution order made by a Chancery Judge under s. 154 has the same effect. Only, as the old company has gone, there is no one from whom damages can be claimed. If the employee, ignorant of the change, continues to work in his old position he cannot, as now decided, be said to be in any contractual relationship with the new company which enjoys the benefit of his work. There can be neither a contract implied in fact, nor a novation of the old contract, unless the employee knew of

the change. Can he, then, claim any wages? It will not be easy to construe the conduct of the new company in such a way as to give rise to an estoppel. If that is not the case, the employee is thrown back on a claim for a *quantum meruit*. This he will probably be able to claim, and he will also enjoy the benefits of the Workmen's Compensation Act, Factory Legislation, etc., the application of which depends on the fact of employment rather than on the existence of a contract. In effect, however, it means that his position is more precarious than it would have been, if a regular contractual relationship had existed, though in practice the differences will be small.

Most of the Lords who made speeches in this case considered the implications which their decision may have on contracts other than contracts of employment, and on legal relationships of a non-contractual nature. If the transferor company had purchased goods on credit, if it had bought or sold goods to be delivered by instalments, if it was a publishing company under contractual obligations to authors, if it was a leaseholder, incapable of assigning the lease without the consent of the lessor, if it held shares which could not be transferred without the consent of the directors, if it had acquired a right to damages in tort—in all these cases the problem of the destiny of non-transferable rights would arise. Viscount Simon made it very clear that his judgment was limited to contracts of personal service, but it is difficult to avoid the application of the present decision to those other cases by simple parity of reasoning. It would seem that the principle *actio personalis moritur cum persona*, six years after having been more or less successfully buried by the Law Reform (Miscellaneous Provisions) Act, 1934, has been helped at least to a partial resurrection by this decision, but the whole problem of the effect of company amalgamation on non-assignable assets has been posed rather than solved by this case.

Whilst we should welcome the steadfastness with which the majority defended the sanctity of the employee's freedom of contract we may well deplore with Lord Romer the practical inconveniences to which the decision is bound to give rise.

O. Kahn-Freund.

Collective Agreements

Although collective agreements and industrial awards are of increasing social importance, the law of collective bargaining is still in its infancy. An agreement made between a trade union and an employer or employers' association has a twofold legal function: it constitutes a contract between the union and the employer or employers' association (contractual function) and at the same time it serves as a *lex contractus* for the contracts of employment coming within its orbit (normative function). British legislation contains one rule concerning the contractual function,[1] but there is very little, if anything, in this country to elucidate the normative effect of collective rules. The decision of the Privy Council in *True* v. *Amalgamated Collieries of Western Australia, Limited*, [1940] A.C. 537, though dealing with a minor point arising from the construction of a Western Australian statute, deserves attention as a contribution to the analysis of the legal relationship between collective and individual agreements.

[1] Trade Union Act, 1871, s. 4 (sub-s. 4), which is to the effect that a collective agreement is unenforceable if made between a trade union and an employers' association.

Under the Industrial Arbitration Act (Western Australia), 1912–1935, a Court of Arbitration has jurisdiction to make awards each of which operates "as a common rule of any industry to which it applies." Collective agreements and industrial awards are rendered immune from being contracted out by the parties to the contracts of employment. "Every contract, in so far as it purports to annul or vary such award or agreement, shall, to that extent, be null and void without prejudice to the other provisions of the contract which shall be deemed to be severable from the provisions hereby annulled." "Every worker shall be entitled to be paid by his employer in accordance with any industrial agreement or award binding on his employer and applicable to him and to the work performed, notwithstanding any contract or pretended contract to the contrary, and such worker may recover as wages the amount to which he is hereby declared entitled . . ., but every action for the recovery of such amount must be commenced within twelve months from the time when the cause of action arose." The dispute, which gave rise to a difference of judicial opinion in the High Court of Australia and ultimately found its way to the Privy Council, originated in the concluding words of the section.

A coal-miner was engaged to work under a verbal contract which expressly referred to the relevant award. He alleged that the wages paid to him had fallen short of those provided for in the award. The action by which he claimed the difference was brought within the period of limitation applicable to contractual claims, but outside the twelve-months period laid down in the section. The Judicial Committee, reversing the majority decision of the High Court of Australia, and restoring a decision of the Full Court of the Supreme Court of Western Australia, held that the twelve-months period did not apply and that the action succeeded. The claim was, in the opinion of Lord Russell of Killowen, who delivered judgment, based on the contract, and not on the statute. The statutory right alone was subject to the short limitation period, and this statutory right operated only where the contract of employment was at variance with an industrial agreement or award, but not where, as in the present case, the individual contract expressly referred to the collective rule.

The decision involves more than a mere question of a period of limitation. Although English law has not so far taken cognisance of the normative function of collective industrial rules, it may soon be found that the present state of the law is unsatisfactory and that the individual contract of employment should not be allowed to derogate from the terms of the collective bargain to the detriment of the employee. It will then be necessary to reflect upon the ways in which the normative function of collective agreements can be made legally effective. It should be realised that the normative effect of collective bargains cannot exhaust itself in the mere annulment of individual contracts purporting to contract out the collective rule. Indeed, as was pointed out by Lord Russell of Killowen in the judgment under review, if a contract of service providing for a wage below the "union rate" was merely annulled by the collective bargain, the workman would be faced with a difficult situation, for according to the well-known rules of the common law, the displaced terms of the express contract would prevent him even from suing on a *quantum meruit*. In order to achieve its social purpose, the collective bargain must not impair the validity of the contract of employment, the *vinculum obligationis* as between employer and employee must remain intact, but the contract must be deemed to have been concluded upon the terms of the collective bargain. This is a

characteristic shared by collective wage and labour agreements with other legal rules protecting the socially weaker against the socially stronger party to a contract (housing legislation, etc.). The common law restrictions upon the freedom of contract are usually of a purely prohibitive nature: the law only demands that something shall not be done: it forbids, but it does not command, it is interested in preventing contractual relationships of an obnoxious character, but not in laying down a positive policy with which contracts have to comply. Nullity of contract is, therefore, an adequate sanction of most of those common law rules which embody principles of public policy, *e.g.* an agreement in restraint of trade without consideration is void, it is not deemed to have been concluded at an adequate consideration. Modern social legislation is of a different character: it contains *leges contractus* embodying standards of conduct which cannot be enforced by mere nullity provisions. The Western Australian statute expresses this, somewhat clumsily perhaps, in that it first annuls those terms of the individual contract which are at variance with the collective rule, then expressly upholds the validity of the contract as such with the help of the principle of "statutory severability," and finally gives the employee the right to rely on the collective provision in lieu of the avoided contractual term. What happens in fact is that the contract of employment purporting to relieve the employer of his duty to pay the "union wage" is not void at all, though the collective wage automatically displaces the individual wage agreement.

The question before the Privy Council, then, was this: Does a workman who claims from his employer compliance with compulsory collective standards, *e.g.* payment of the union wage, rely on his contract of employment, or does he claim upon the statute which gives effect to the normative function of the collective bargain? Three cases can be distinguished: either the contract of employment expressly embodies, or refers to, the collective rule, as in the present case, or it is silent as to the subject-matter regulated in the collective bargain, or it purports to derogate ftom the collective rule. In the first case, according to the Privy Council, the collective rule becomes a term of the contract and the claim is "contractual," while in the third case the workman, in claiming his collective rights, relies on the statute. As to the second case the judgment of the Privy Council leaves the question unanswered.

The distinction thus made by the Privy Council would seem to be unsatisfactory as a basis of future legislation in this country. It does not correspond with the fundamental idea of collective bargaining. It is of the essence of the collective agreement that it does not operate as a law superimposed from above, but as a compulsory standard contract. Even where it displaces part of the contract of employment the collective provision should be deemed to operate as a contractual clause between employer and workman.

This view would also be in accordance with the decision of the Court of Appeal in *Gutsell* v. *Reeves*, [1936] 1 K.B. 272. There an agricultural worker claimed the difference between the statutory minimum wage under the Agricultural Wages (Regulation) Act, 1924, and the "contractual" wage. It was held that he was claiming upon the contract and not upon the statute. Lord Wright, M.R., pointed out that "the claim is on the basis of the whole contract of employment . . . and the only effect of the statute on that contract is to insert, against, it may be, the overt agreement of the parties, the proper rate of wages . . ." The claim was, therefore,

subject to the limitation period prescribed for contractual claims by the Statute of Limitations, 1623, and not to the longer period applicable, under the Civil Procedure Act, 1833, to actions upon a statute. It is submitted that this view taken by the Court of Appeal of the legal nature of such minimum wage legislation is preferable to that taken by the Privy Council in the case under review. If it is correct in regard to statutory minimum standards of conditions of labour, it should, *a fortiori*, apply to legislation passed with the object of enforcing upon the parties to the contract of employment standards laid down in a collective agreement.

This type of legislation gives effect to a new conception of contractual freedom. It recognises the fact that the employer and employee are not on an equal footing and that, as between them, freedom of contract is often merely formal. It, therefore, transfers the freedom of contract from the individual into the collective sphere, assuming that the equality of bargaining power which is absent between "master" and "servant" exists between their collective representatives. The correctness of this assumption is the political *conditio sine qua non* of the practical effectiveness of collective industrial law. It need hardly be emphasised that the questions discussed in this note have nothing to do with the compulsory character of industrial awards. Whether awards rendered by industrial courts, etc., are compulsory upon unions and employers' associations is a problem very different from that, whether collective bargains are capable of displacing individual terms less favourable to the employee. Again, the question of the scope of application of the collective bargain may either be confined to members of the unions on both sides, or extend to non-members on both or either sides.

O. KAHN-FREUND.

Ross T. Smith & Co., Ltd. v. T. D. Bailey, Son & Co., Ltd. (1940), 3 All E. Rep. 60

Although concerned nominally with the obligation of the seller as to tender of documents upon the construction of a particular c.i.f. contract, this case is of general importance in that it deals with a problem which has always been of great theoretical interest to commercial lawyers, viz. the question of the passing of the property upon a contract of this type. The matter is not one of much practical moment because as Atkin, J., pointed out in *Groom Ltd.* v. *Barber*, [1915] 1 K.B. 316, the crucial matter under c.i.f. contracts is always the tender of the document. It has nevertheless been discussed in quite a number of cases, but in such an unsatisfactory manner that the textbook writers have deduced quite opposite conclusions from the authorities, e.g. while Goitein says "*prima facie* the property in the goods passes on shipment. It may pass either conditionally or unconditionally, etc.,"[1] Kennedy says, "but the property in the goods may not and generally does not, pass on shipment or until tender and payment. It is entirely a question of intention and no general rule can be laid down as to when property passes under a c.i.f. contract."[2] The two statements are not literally incompatible, but they well illustrate the two opposing views.

It is quite obvious that upon shipment of the goods there is a sufficient appropriation under s. 18, r. 5 (1) of the Sale of Goods Act to pass the property to the buyer. The difficulty arises because in practice the seller

[1] *Law of C.I.F. Contracts*, p. 64.
[2] *Kennedy on C.I.F. Contracts*, p. 141.

usually takes the bill of lading to his own order, thus reserving the right of disposal over the goods, which prevents the appropriation by shipment from being unconditional as is required by s. 18, r. 5 (1). This was what in effect happened in the instant case. We thus get the problem as to what happens when an appropriation is made conditionally, e.g. upon the buyer taking up the documents, or accepting a draft for the price. Is the seller left completely free to use his right of disposal so as to alienate the property in the goods to some third party, subject of course to being guilty of a breach of the contract of sale, or does the conditional appropriation effect a conditional transfer of the property which would prevent the seller disposing of the goods until such time as the buyer may have failed to observe the condition?

The Sale of Goods Act is silent upon this point. Such authority as there has been up to the present seems to me to have favoured the latter view, which certainly seems to be the most equitable. Thus in his celebrated judgment in *Clemens Horst Co.* v. *Biddell Bros*, [1911] 1 K.B. 934, Kennedy, L.J., discussing a case where the contract provided cash against documents nevertheless stated that the property passes to the purchaser "from the moment of shipment." This appears also to have been the view of Lord Parker in *The Parchim*, [1918] A.C. 157.

On the other hand it may be considered that the very term "right of disposal" implies that the seller is still free to transfer the property to a third party. Actually this is not necessarily so, because the phrase may only mean that there is to be a right of disposal in the event of the buyer failing to observe the condition. Nevertheless it is clear that it may be of immense advantage to the seller to be able to obtain temporary finance in connection with the contract by pledging the document with his banker over the intermediate stage before the time comes for the tender of them to the buyer. Indeed this has become a very common practice, the banker under the provisions of the ordinary documentary credit type of finance assuming the obligation of tendering the documents to the buyer, or more often to the buyer's banker, who will in turn be financing the transaction from the buyer's end. There has thus become a strong commercial reason for postponing the passing of the property, even conditionally, until the time for tender of the documents. It seems clear that Lord Sumner in his discussion of *The Parchim* (*supra*) during his speech in the *Kronprinzessin Margareta, The Parana*, [1921] 1 A.C. 486, was not in agreement with the view taken by Lord Parker in *The Parchim* (*supra*) because of the importance which he attached to the seller's being able to obtain this type of finance. During the intervening period this aspect of the matter has certainly increased in importance and it was clearly a dominating influence with the House of Lords in the instant case when coming to their decision. Lord Wright, whose speech was accepted by the other law lords, made this very clear in the following statement—

> "In this course of business, the general property in the goods remains in the seller until he transfers the bills of lading. . . . The property which the seller retains while he or his agent, or the banker to whom he has pledged the documents, retains the bills of lading, is the general property, and not a special property by way of security. In general, however, the importance of the retention of the property is not only to secure payment from the buyer but for purposes of finance. The general course of international commerce involves the practice of raising money on the documents so as to bridge the period between

> shipment and the time of obtaining payment against documents. These credit facilities, which are of the first importance, would be completely unsettled if the incidence of the property were made a matter of doubt. By mercantile law, the bills of lading are the symbol of the goods. The general property in the goods must be in the seller if he is to be able to pledge them. The whole system of commercial credits depends on the seller's ability to give a charge on the goods and the policies of insurance. A mere unpaid seller's lien would, for obvious reasons, be inadequate and unsatisfactory." (At p. 68.)

It may be taken therefore that in all cases where c.i.f. contracts are performed in a normal manner with reservation of the *jus dispossendi* no property passes to the buyer even conditionally until the tender and acceptance of the documents.

R. S. T. C.

Profits Foregone—Deductible Expenses?

Income Tax law is inevitably as complex as the multifarious affairs of mankind with which it deals, but that is no reason why it should be more than necessarily divorced from commercial and accountancy principles of computing profits. A difference due to specific statutory directions, e.g. as to capital expenditure, wasting assets, etc., may account for a certain divergence, but apart from this, the two should as nearly as possible approximate to one another. As Viscount Maugham reminded us, in the instant case, it is well settled that profits must be ascertained, for taxation purposes, as far as possible, on ordinary commercial principles, see *Gresham Life Assurance Society* v. *Styles*, [1892] A.C. at pp. 316–321, and *Usher's Wiltshire Brewery Co., Ltd.* v. *Bruce*, [1915] A.C. at p. 458. In *Lowry* v. *Consolidated African Selection Trust, Ltd.*, [1939] 108 L.J.K.B. 374, the Court of Appeal held that the respondent company—in offering and issuing shares to its employees at par when their value in the open market was considerably more—was entitled to charge the difference as an expense in computing its profits for taxation purposes, although it had neither reduced its profits nor its capital by any such amount.

In *Weight* v. *Salmon* (1935), 151 L.T. 410, the House of Lords had held that, in similar circumstances, an employee to whom such shares had been offered and issued was chargeable upon the difference between the market and par values of the shares as a profit arising from their employment since, though they had not realised this difference in cash, it yet represented "money's-worth." The Court of Appeal relied on this case and a dictum of Lord Sumner in *Usher's* case—"A trader who utilises, for the purposes of his trade, something belonging to him, be it chattel or real property, which he could otherwise let for money, seems to me to put himself *to an expense for* the purposes of his trade . . ." [1915] A.C. 433 at p. 469—to hold that, in forbearing to issue their shares at their market value, the respondent company had incurred an expense which it could charge against its profits; if its employees were chargeable on the difference between the market and par values of the shares, then the company had suffered a financial detriment to this extent; short shrift was given to the Crown's argument that to forego a profit was not the same as incurring an expense.

This revolutionary doctrine—the term "revolutionary" is apposite in view of the very far-reaching results that would follow if, for any reason, a trading concern did not use an opportunity of securing some financial advantage and was thereby held entitled to reduce its taxable profits by

the amount thereof—was rejected by a bare majority of the House of Lords, [1940] 2 All E.R. 545. Lord Sumner's dictum in *Usher's* case, *cf. supra*, as to "profits foregone" was emphatically disapproved and the principle in that case was held limited to one that tied houses are part of a brewer's undertaking so that the annual value thereof is a deduction in computing profits—this follows Lord Buckmaster's similar view in *Collyer* v. *Hoare & Co., Ltd.* (17 Tax. Cas. at p. 209). The deduction of annual value was held to be the only exception to the rule that no allowance can be made in computing profits save in respect of disbursements and expenses *actually* incurred by the trader (Rule 3 (*a*), Cases 1 and 2 Rules, Schedule D, Income Tax Act, 1918). In the instant case no expense had, in fact, been incurred by the company nor had it suffered any financial detriment in the issue of shares at par since "there was no law compelling a company to issue its shares above par because they were saleable at a premium in the market" —so, Lord Davey in *Holder and others* v. *Dexter*, [1902] A.C. at p. 480. This decision of the House of Lords is of great importance since it has definitely checked a growing tendency in the Courts to extend the principle in *Usher's* case far beyond the real issue therein. The death knell of the "profits foregone" doctrine—if so it may be termed—is perhaps best found in these words of Lord Maugham: "For myself I am unable to think of any concrete example of a 'profit foregone' in relation to goods or chattels or services rendered which would stand the test of justifying the deduction on ordinary business principles."

A. Farnsworth.

Domicil of Corporations

The Income Tax Codification Committee at page 41 of its Report (Cmd. 5131—1936) said of the domicil of companies: "An investigation of the subject revealed that it was one which . . . throws up problems upon which no direct statutory or judicial authority exists." *Gasque* v. *Inland Revenue* (1939), 31 T.L.R. 437 is the first case in which the question of the domicil of a corporation has been *directly* before the Courts; s. 18 Finanec Act, 1936, stops a hole in the taxation net in cases in which there has been a transfer of assets by which income becomes payable to a person (which term statutorily includes a Company) not domiciled in the United Kingdom. In the instant case there had been a transfer of assets to a Company incorporated in Guernsey and it sought to argue that, as the scene of its activities had been transferred to this country, not only was the company resident here but also that the section was inoperative as regards companies since, as counsel for the appellant argued, "by the law of England a body corporate has no domicile." Macnaghten, J., in rejecting this contention, enunciated that just as the attribute of residence had been given, by way of analogy with a natural person, to a corporation, so too could the attributes of domicil and nationality be given. He considered that the domicil of origin, or as he more picturesquely termed it, the domicil of birth clung to a company *throughout its existence*. He found support for this view in the judgment of Mr. Justice Holmes in *Bergner & Engel Brewing Co.* v. *Dreyfus* (1889), 172 Mass. 154, to the effect that a corporation could only have a domicile in the country of incorporation and also in a dictum to like effect by Sargant, L.J., in *Todd* v. *Egyptian Delta Land & Investment Co., Ltd.* at [1928] 1 K.B. p. 173.

Both Dicey and Cheshire consider that the domicil of a corporation is

the "place of central control and management," and since this can be outside the country of incorporation—*De Beers Consolidated Mines, Ltd.* v. *Howe* (1906), A.C. 455—it follows that, in their view, a corporation can change its domicil from the country of incorporation to some other country. The writer of these notes, in his recent work *The Residence and Domicil of Corporations* (reviewed at 3 M.L.R. 174/5), dissented from this commonly accepted view and gave reasons why a corporation, though *theoretically* able to acquire a domicil of choice, was unable *in law* to change its domicil of origin, see pp. 217/22. His opinion would seem to have been upheld in the instant case which laid down that, in English law just as in American law, the domicil of a corporation was always that of the country of its incorporation.

A. FARNSWORTH.

REVIEWS

THE LAW IN QUEST OF ITSELF. By LON L. FULLER, *Professor of Law, Duke University, Visiting Professor, Harvard Law School.* 1940. Chicago: The Foundation Press, Inc. pp. vii and 147. **$2.**

This volume contains the text of three lectures "provided by the Julius Rosenthal Foundation for General Law and delivered at the Law School of Northwestern University at Chicago in April, 1940." The author proposes at the start a pragmatic definition of the function of legal philosophy as "attempting to give a profitable and satisfying direction to the application of human energies in the law," and suggests the question, "Would the adoption of the one view or the other affect the way in which the judge, the lawyer, the law teacher, or the law student, spends his working day?" as a pragmatic test of the reality of its controversies. This test he applies to show that the old controversy between Natural Law and Positivism is a real and vital one, and his definition turns in his hands into a weapon which he wields vigorously in an onslaught on Positivism and all its works. Excluding from his survey the sociological Positivism of Comte, Dürkheim and Duguit, and also the historical school founded by Savigny, he sketches briefly and pungently the growth of positivistic analytical jurisprudence (Austin, Somlo) from the simple and common-sense Positivism of Hobbes, touches on the pervasive ambiguity of Austin's account of the Sovereign (is the Sovereign an actuality or a juristic construction?), and then traces the development of the more characteristic modern positivistic theories "along the two sides of this ambiguity." The "realist" view of Kornfeld, Ehrlich, and numerous Americans and the pure abstraction of the Viennese school are for him but obverse and reverse of the same thing. The essence of Positivism is its rigid separation of the "Is" and the "Ought," with the corollary that the study of the "Ought" is no concern of the lawyer, or, at any rate, can be postponed until the "Is" has been thoroughly dealt with. Positivism thus leads to narrowness of outlook, diffidence, and ethical scepticism. The only possible moral beauty in positivists is a blind romantic loyalty—"Theirs not to reason why"—and it is significant that the image of the faithful soldier appears so often in their writings. Professor Fuller, on the other hand, thinks that the "Ought"—the moral "Ought"—enters into every legal activity. Law is a process of becoming. Every decision,

every expression of opinion on a point of law, imports something new. And failure to recognize this has a cramping and inhibitive effect on judges, writers, and teachers, and may endanger the stability and the very existence of systems of law by causing them to lag more and more behind the developments of extra-legal life.

It may be objected that this line of thought leads, or can be made to lead, to a definitely false picture of law, at least of Anglo-American law, as it actually is. If the relevant rule of law is clear, the judge is bound to apply it logically to the case before him, however unjust or inexpedient he may think the result to be. And this is not merely the result of a deplorable positivistic tendency in the judge's mind, but a rule of law. See, for example, *Cunliffe* v. *Brancker*. Whether this is desirable or not —Professor Fuller's pragmatic test—is another question. The difficulty of combining certainty and flexibility is an old and familiar problem. The extreme but natural development of Professor Fuller's view would seem to destroy all certainty. Professor Fuller does not make it very clear to what source the judge or teacher, scorning the "Is" of law as laid down in statute or decision, is to apply for guidance as to the "Ought." Yet without such guidance can the administration and exposition of the law be more than the application of the personal predilections of the judge or teacher, masked perhaps as his interpretation of "common-sense" or "the spirit of the people"? The best working solution may be that of English law, which achieves a measure of certainty by holding that legal rules clearly expressed must be logically applied, in spite of occasional injustices, and a measure of flexibility by allowing for free criticism and legislative reform, by giving scope to administrative discretion in suitable cases, and (a point often overlooked by critics) by introducing into the judicial process at certain points reference to extra-legal and changing standards such as "business usage" or "reasonable conduct."

But, although some of the implications of Professor Fuller's views seem open to criticism, his work, learned, thoughtful and stimulating, should certainly be read by all, especially by positivists.

A. H. Campbell.

EFFECT OF WAR ON CONTRACTS. By George J. Webber, LL.M. 1940. London: The Solicitors' Law Stationery Society, Ltd. xliii and 568 pp. **37s. 6d.** net.

EFFECT OF WAR ON CONTRACTS. By P. H. Thorold Rogers, B.A., B.C.L. 1940. London: Sweet & Maxwell, Ltd. vii and 171 pp. **10s. 6d.** net.

The outbreak of war has certain effects upon the law of contract which are unique, but in other respects it merely causes for the time being an unusual emphasis upon some of the general principles which are being applied and studied during more peaceful times. The former aspects of the subject vary a good deal from one war to another owing to the legislative action which the increasing complexity of modern law calls into existence. They are accordingly somewhat unfamiliar both to students and to practitioners, and such volumes as those under review become a very necessary part of the equipment of every lawyer who would be abreast of the times. The latter should be more familiar, at any rate to those who have studied the law of contract at all seriously. In actual fact, however,

there is no aspect of the subject on which there is less unanimity of opinion, and more woeful ignorance, than those of illegality and impossibility of performance, and this despite the fact that of recent years considerable attention has been devoted to it both by textbook writers, and in the legal periodicals. A careful and painstaking attempt, such as that made by Mr. Webber in the volume under review, to throw light upon this murky subject is very much to be welcomed.

It can readily be understood that this latter type of problem is much more attractive to the academic lawyer than are most of those connected with the actual outbreak and conduct of the war. Mr. Webber who displays considerable powers of analysis has obviously become fascinated by the problem of commercial frustration to which he devotes more than half the substantial number of pages at his disposal. His contribution is certainly one of the most valuable which has been made to the elucidation of this subject not only for the succinct and careful account which he gives of the views which have been put forward by other writers both in this country and in the U.S.A., but for his own opinions which are at once carefully weighed and independent. The practitioner who is nothing more may turn away from the lengthy analysis with impatience, but he who is more than a mere workman cannot but be held by the interest of the developing argument. Mr. Rogers on the other hand hardly devotes a fifth part of his volume to this topic, and while he refers to most of the leading cases in a lucid and interesting way, never really succeeds in getting a clear conception of the juristic basis of frustration, a failing which may perhaps be excused since it is one which he shares with the majority of the judges who have had to handle this type of case.

There is hardly any other branch of the law of contract which demonstrates both the weakness and strength of the common law so well as that of impossibility of performance. The original conception was simple, austere and inelastic. If the contract was obviously impossible at its inception, there was no contract at all, *lex non cogit ad impossibilia*. Otherwise the rigour of the law drove the unfortunate party who found that he could not perform his promise to expiate his fault by payment of damages. Except for the famous and abortive attempt made in *Paradine* v. *Jane* (1647), Aleyn 26, no litigant was found who had the audacity to defend himself on grounds of impossibility until after the middle years of the last century. It is true, however, that as one would expect, the commercial community obtained at a much earlier stage and in connection with certain categories of contracts with which they were peculiarly concerned, such as sale and carriage of goods, a considerable alleviation of the common law rules. A contract for the carriage of goods from one place to another was by the custom of England regarded, as from the seventeenth century at any rate, not as an absolute undertaking, but as one from which the promisor could claim to be excused if the Act of God or the King's enemies rendered it impossible. Nevertheless these exceptional cases were never decided upon the basis of any juristic reasoning and when the modern epoch opened with such cases as *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, their existence was overlooked, though later they were recollected, and played some part in leading the courts astray in *Chandler* v. *Webster*, [1904] 1 K.B. 493, with its well-known maxim that "the loss must lie where it falls."

The doctrine of commercial frustration proper can hardly be dated

farther back than *Jackson* v. *Union Cold Storage Coy.* (1874), L.R. 10 C.P. 125, a case the importance of which in the general law of contract was overlooked. It was not until the well-known series of cases connected with the postponement of the coronation of Edward VII that the courts were really required to enunciate some sort of a doctrine, a task which the recurrent controversy which these divisions have evoked indicates that they failed successfully to accomplish. In the war of 1914–18 the problem was raised much more insistently, and the inadequacy of the implied condition of the contract theory (i.e. tacit term) as a satisfactory basis for the doctrine became more and more evident. In his well-known dissenting speech in *Tamplin's Case*, [1916] 2 A.C. 397, Lord Haldane enunciated the new theory under which the implied condition is not a tacit term at all, but a term implied by law. It was quite a substantial period, however, before the majority of the judges awoke to the fact that there was any real difference between the two approaches to the problem, and we have Lord Finlay in the *Larrinaga Case* ([1923] 29 Com. Cas. 1) accepting both the theories in the same sentence, apparently oblivious of the fact that there is a vital difference between them. The older theory may still have the larger volume of authority behind it, but after reading what Mr. Webber has to say upon the subject one cannot help feeling that the heavier guns have been firing upon the other side. Recently, too, Lord Wright in his *Legal Essays and Addresses*, has by dressing out Lord Haldane's doctrine in a new suit of clothes added to its attractiveness, for we agree with Mr. Webber that Dr. McNair's argument (see 56 L.Q.R., p. 180) that Lord Wright has invented a third theory of frustration is fallacious.[1]

The thoroughness of Mr. Webber's study will be evident from the fact that he examines not only cases and legal writings in this country, but also in the U.S.A., and further that he discusses the reports of the Buckmaster Committee of 1917 and of the Andrewes-Uthwatt Committee of 1939. Again he has a whole chapter on the onus of proof in this type of case though there is only one case directly in point, that of the *Imperial Smelting Corporation, Ltd.* v. *Joseph Constantine Steamship Line, Ltd.*, [1940] 1 K.B. 812 (see 4 Mod. L.R., 63) of which Mr. Webber gives an acute and illuminating account.[2] When we have noted that he also provides an exhaustive discussion of the rule in *Chandler* v. *Webster*, [1904] 1 K.B. 493, particularly in the light of the report on this subject by the Law Revision Committee, we have perhaps sufficiently indicated that he has produced a work which no future student of this subject will be able to ignore.

In dealing with the more special aspect of war and the law of contract Mr. Webber is perhaps not quite so successful, and here Mr. Thorold Rogers' shorter study is in some ways to be preferred. A very good deal of this side of the matter is bound up with the Trading with the Enemy Act, 1939, and the orders issued under that Act and under the Defence Act, 1939, the Ministry of Supply Act, 1939, and other Statutes, the complexity of which legislation is sufficiently indicated by the article published in the current number of this review. Mr. Thorold Rogers has

[1] See *The Principles of Impossibility in Contract*, by H. W. R. Wade, 56 L.Q.R. 519, which I have seen since the above was written. The author also puts forward a third theory, which also appears to me to be nothing more than a development of Lord Haldane's view.

[2] This decision has now been reversed by the Court of Appeal: [1940] 3 All E.R. 211.

made a special study of this side of the subject, and the pages which he devotes to it in the present volume are to be commended. Where for example this topic hinges up with that of frustration his treatment is definitely fuller than that of Mr. Webber. Again, the same is true of his account of the powers and duties of the Public Trustee in regard to enemy contracts and property, a subject on which Mr. Webber's remarks are somewhat cursory and in respect of which his discussion of the earlier case law is somewhat wanting in detail. Again, while the Defence of the Realm Acts of the 1914–18 war are not directly in point, it can hardly be doubted that many of the decisions will be found useful, and it is accordingly rather surprising to find Mr. Webber omitting all reference to such cases as *Newcastle Breweries* v. *R.*, [1920] 1 K.B. 854; *Robinson & Coy.* v. *The King*, [1921] 3 K.B. 183, and *Central Control Board* v. *Cannon Breweries, Ltd.*, [1919] A.C. 744. Also although his preface is dated July he omits the important Defence (Trading with the Enemy) Regulations, 1940, which substantially widens the definition of enemy corporations under the Trading with the Enemy Act, 1939. In all these respects, and in a number of others, Mr. Thorold Rogers' work is the more complete.

Subject to this both authors give an adequate discussion of the meaning of alien enemy, of the general principles of law governing contracts made with an enemy, and the procedural difficulties which arise. From this Mr. Webber in the greater space at his disposal proceeds to examine in some detail the position of the principal types of commercial contract in the light of these principles, a series of chapters extending over 150 pages, which cannot fail to be of considerable practical service to the busy practitioner. R. S. T. C.

THE LAW AFFECTING BUILDERS. By The Hon. D. Meston and H. E. Piffe-Phelps. xxxvi and 267 pp. (with Index). London, Messrs. Sweet & Maxwell, Ltd. 1939. **15s.**

The remarkable feature of this book is the breadth of its scope. The authors say in their preface that "the real dominant purpose of the present book is to collect under one cover a whole multitude of subjects for information relating to which it would otherwise be necessary to make extensive researches throughout a number of different works." The result may well be to deter from active operations any but the most courageous builder. On the other hand the man who has the nerve to go on will find in this little book a friend indeed, full of wise counsel even if, like some other oracles, a trifle obscure at times.

It is perhaps a defect in the book that it compresses so much into a small space that only a reader with considerable knowledge of the law can fully understand it. It starts off with a chapter on inquiries to be made before entering into a contract to buy land, in the course of which the effect of the Land Charges Act, 1925, is explained in less than seven pages. Incumbrances "generally" are dealt with in a chapter of three pages and restrictive covenants (including, of course, their removal) in a chapter of twelve pages. The wise builder will read the relevant passages and hasten to his solicitor.

Yet one cannot feel that this is really a defect. Having regard to the object of the work it must be regarded as inevitable. Far more important is the completeness of the catalogue. The collection of the very numerous statutory provisions relating to houses and other buildings and their

builders is of great value. Where else can one find readily available an outline of the law relating to building and improvement lines, new streets, town and country planning, restriction of ribbon development (with information as to where to find some account of decisions that have actually been given) and housing? Almost certainly nowhere. Lack of legal training would seem a less serious obstacle to understanding the effect of Acts of Parliament relating to town planning and kindred matters than it is to the understanding of the law which determines the effect of a restrictive covenant.

There are also chapters which reveal the authors' sympathy with the builder and their appreciation of his needs. Contracts (including options), mortgages, and those aspects of the law which assume special importance in relation to architects, quantity surveyors and estate agents—the very stuff of building enterprise—all these are dealt with. A part of the book particularly appropriate is a little chapter called "Bankruptcy and Winding-up." Altogether a valuable book that deserves well of the building trade and the trade's professional advisers.

G. L. HAGGEN.

THE SOLICITORS' HANDBOOK OF WAR LEGISLATION. By S. M. KRUSIN and P. H. THOROLD ROGERS. 1st Supplement, xv and 143 pp. **7s. 6d.**; 2nd Supplement, xxiv and 336 pp. **17s. 6d.** London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd.; and the Solicitors' Law Stationery Society, Ltd.

The principal work supplemented by these two issues was published in 1939, and reviewed in the *Modern Law Review*, Volume III, at p. 333. In that review the general nature of the work was described and its contents, printing and production commended.

In both Supplements the plan of the principal work has been followed —each part being introduced by a preliminary note containing a brief general description of the more important statutory and other changes and additions and then the new statutory material is printed with annotations. To facilitate reference, the page numbers of the principal work have been given in all cases where any additions, amendments or deletions have been made to the material thereof. In their Preface to the 2nd Supplement the Authors express their regret that the exigencies of the paper supply render it impossible for them to make the Supplement cumulative and they have sought to make up in part for this by preparing a cumulative index.

The 1st Supplement was published in February and includes all "War Legislation" up to, and including Statutory Rules & Orders published on 7th February, 1940. In the 2nd Supplement, which was published on 29th August, all material legislation pass up to the 30th June has been included and some later additions and amendments were incorporated as opportunity offered. An Addenda of new legislation is completed up to 15th August.

The greatest mass of material appears under Defence (General) Regulations; for example nearly one hundred pages are occupied by these regulations in the 2nd Supplement alone. The annotations, from the nature of the legislation, are somewhat scanty but as was said of the principal work, so it may be repeated of the two supplements, "the annotations so far as they go are very helpful." D. H. PARRY.

THE CONVEYANCERS YEAR BOOK, 1940. By Sir Lancelot H. Elphinstone. The Solicitors' Law Stationery Society. 1939. **10s. 6d.** net.

This is a most comprehensive and useful book, which is of particular value to practising lawyers at the present time when the statutes and regulations necessitated by present hostilities are so numerous and complex. The full index and plentiful cross-references enable the reader to discover all relevant information on any point considered both quickly and easily. The references to the various Rules and Orders quoted, though necessarily soon obsolete in some cases, are useful as are those to the leading books of precedents.

The treatment of the new Statute of Limitations showing all the changes which it makes is especially clear, but the printing of the sections dealing with mortgages in two different places seems unnecessary. This point of duplication also arises with regard to the Military Training (Consequential Provisions) Order, 1939, and the Reserve and Auxiliary Forces (Consequential Provisions) Order, 1939, which are in substantially the same terms and might therefore be treated together. This seems unfortunate as there are many questions on which one would appreciate the learned author's views, as for instance giving the form of words required to pass the right to receive compensation under the Coal Act, 1938, on which there was some controversy in the *Law Times*. In some cases also an explanation of the definitions in a statute instead of a bare mention of the section containing them would be helpful. The definition of factories and commercial buildings in section 89 of the Civil Defence Act, 1939, is a case in point. Sub-section 1 applies the definition of a factory contained in the Factories Act, 1937, but excludes any factory which is wholly or partly in a building occupied by others, as to the whole or that part. Sub-section 2 provides that this exception shall not apply where the factory employs more than fifty persons. Sub-section 5 says that a commercial building is one in which more than fifty persons are employed and which does not fall within the meaning of a factory as previously defined.

Some reference might also have been made to the case of *Worthy* v. *Lloyd* (1939), 59 T.L.R. 534, which decided that where part of a dwelling which had been decontrolled was let together with part which remained controlled it became recontrolled. This of course is not so important, since the passing of the Rent Act, 1939, but may still be useful as to houses which were controlled prior to the passing of that Act.

The summaries of the rules laid down in new decisions are most useful as are the brief notes on their cumulative effects and the precedents necessitated by them. In short this is a practical book which has appeared very opportunely and deserves every success in the future.

N. L. D. Muller.

THE GESTAPO. By O. C. Giles. Oxford Pamphlets on World Affairs, No. 36. 32. pp. **3d.**

Many of these Oxford pamphlets are extraordinarily good value for money, and few more than this one. Most of us have read or heard a good deal about one activity or another of the Gestapo of recent years. Here is a well-balanced and well-constructed summary of its work, leadership, and personnel which will enable us to get the whole thing into perspective.

Lawyers in this country have paid too little attention to the inter-reaction of the law and the police force, though it would yield fruitful material. In Germany, however, the secret police wields at once legislative, judicial, and ministerial powers in respect of all matters which affect or may affect the security of the régime; and its work must be of concern to all who have any care for constitutional or criminal law. Although the author does not conceal his antipathy to this monstrous engine of tyranny, his study is strikingly moderate in tone; but the indictment gains force by the understatement of the case.

R. S. T. C.

THE LAW RELATING TO COMMERCIAL LETTERS OF CREDIT. By A. G. Davis, LL.D. (Lond.). 199 and xxiii pp. London: Sir Isaac Pitman & Sons, Limited, 1939.

Although possibly letters of credit have ceased, owing to the restriction imposed by various national currency systems, to have the importance they had when such restrictions did not exist, they still fulfil (in peace time at least) an important function in the financing of international trade. A new book on the law relating to commercial letters of credit is therefore to be welcomed. The present book comprises the author's thesis for the degree of doctor of laws in the University of London and deals with an interesting, important, and difficult branch of commercial law in an excellent manner. Owing to the fact that the commercial letter of credit in its present form is a creation of more modern times (and possibly owing to the reluctance of banks to indulge in litigation!) English decisions dealing with this subject are not very numerous, although fortunately considerable assistance may be obtained from decisions in the Courts of the United States where probably they have more occasion for legal decisions on this matter than we have here. For although such decisions are not binding authorities in this country they are treated with great respect in the English courts and afford valuable assistance to writers and others who try to answer the many problems which arise in this important subject and which are not yet covered by legal decisions. Dr. Davis has cited all the relevant English authorities and fortified these with American ones in his attempt to find solutions to these various problems thus awaiting judicial determination and although all will not necessarily agree with his conclusions the reasons which have led to them will prove interesting and stimulating. His chapter dealing with the legal relation between banker and seller is particularly interesting and valuable.

Very wisely Dr. Davis does not waste too much time in attempting to define commercial letters of credit (not that the short definition which he does give on page 12 is not a good one) but describes their operation, and this chapter will be useful to those who are more versed in the legal than the practical side of their operation for he describes their usefulness and operation in a concise and clear manner. Perhaps to be more accurate the author might have pointed out (on page 16) that the buyer's obligations towards his banker on requesting the latter to open a credit in favour of the seller are sometimes contained in a separate and often widely-drawn contract of indemnity and qualified the phrase (on page 17): "Its (i.e. the letter of credit's) most important feature is that it should contain the banker's undertaking that they will honour drafts drawn on them by the

vendor in respect of the shipment of goods specified in the contract of sale" by adding "provided the drafts are drawn and presented in conformity with the letter of credit" and referring to other documents which often accompany the drafts, in addition to the bills of lading, policy of insurance and invoice, viz: consular invoice, weight note, and certificate of origin.

Having described the various kinds of letters of credit, including the revocable and irrevocable credits and unconfirmed and confirmed credits, which always cause so much difficulty to the legal mind, the author then deals with the legal relationships arising between the various parties to transactions involving commercial letters of credit, viz. buyer and seller, buyer and banker, correspondent and negotiating banker, and above all banker and seller. Chapter 7, which deals with the legal relationships between these two last named, may be considered by many to be the most interesting chapter of the book. Whether any legal relationship does exist between the banker and seller and if so what is the exact nature of such relationship is a problem which has occupied the attention of a number of distinguished writers, including Professor Gutteridge, K.C. Dr. Davis performs a useful function in this chapter by collecting and criticising the various explanations which have been put forward: the guarantee theory, the estoppel or trustee theory, the assignment theory, the novation theory, the agency theory, the seller's offer theory and finally the theory, which has probably most adherents, the offer and acceptance theory. The decisions upon which the offer and acceptance theory is largely based are *Urquhart Lindsay and Company, Limited* v. *Eastern Bank, Limited* (1922), 1 K.B. 318, and *Dexters, Limited* v. *Schenker and Company* (1923), 14 Ll.L.R. 586, and Dr. Davis rightly points out that in the former case Rowlatt, J., suggests that the contract is concluded by the seller's acting upon the undertaking contained in the letter of credit. However, Dr. Davis complains that that learned judge did not explain what he meant by "acting upon the undertaking." But, with respect, the meaning of the learned judge is quite plain. The letter of credit addressed to the sellers in that case was in the common form of an undertaking to pay the sellers against bills drawn on the buyers. In other words the bank said to the sellers: "If you draw bills on the buyers we will pay you." The "acting upon the undertaking" was not the commencement of manufacture—nor, with respect, as Professor Gutteridge suggests in his book on *The Law of Bankers' Commercial Credits*, the tendering of the documents—it was the drawing of the bills. That was the act which in that case and in every normal case of a banker's commercial letter of credit constituted and constitutes the acceptance of the banker's offer. And similarly it was the drawing of the bills which constituted and constitutes the consideration moving from the promisee (the seller) to the promisor (the banker). Consideration is "some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other" (*Currie* v. *Misa* (1875), L.R. 10 Ex. 153), and the banker is getting the benefit of the drawing of the bill which means that he will ultimately get his profit on the transaction.

But the above criticisms are not intended to derogate from the value of an excellent little book.

H. M. Pratt.